No. 18-18 **Vide 17-1717**	
Title:	Maryland-National Capital Park and Planning Commission, Petitioner v. American Humanist Association, et al.
Docketed:	July 3, 2018
Linked with 17A1175	
Lower Ct:	United States Court of Appeals for the Fourth Circuit
Case Numbers:	(15-2597)
Decision Date:	October 18, 2017
Rehearing Denied:	March 1, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Apr 24 2018	Application (17A1175) to extend the time to file a petition for a writ of certiorari from May 30, 2018 to June 29, 2018, submitted to The Chief Justice. Main Document
May 09 2018	Application (17A1175) granted by The Chief Justice extending the time to file until June 29, 2018.
Jun 29 2018	Petition for a writ of certiorari filed. (Response due August 2, 2018) Petition Appendix Certificate of Word Count Proof of Service
Jul 12 2018	Blanket Consent filed by Respondents, The American Legion, The American Legion Department of Maryland, and The American Legion Colmar Manor Post 131. Blanket Consent
Jul 13 2018	Blanket Consent filed by Petitioner, Maryland-National Capital Park and Planning Commission. Blanket Consent
Jul 25 2018	Brief amicus curiae of American Center for Law & Justice filed. VIDED. Main Document Certificate of Word Count Proof of Service
Jul 26 2018	Brief amicus curiae of Military Order of the Purple Heart filed. VIDED. Main Document Certificate of Word Count Proof of Service

Jul 27 2018	Brief amicus curiae of The Becket Fund for Religious Liberty filed. VIDED.(Corrected brief to be resubmitted)
Jul 27 2018	Brief amici curiae of Retired Generals and Flag Officers filed. VIDED. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 27 2018	Brief amici curiae of Major General Patrick Brady and Veterans Groups Erecting and Maintaining War Memorials filed. VIDED. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 27 2018	Brief amicus curiae of Jewish Coalition for Religious Liberty filed. VIDED. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 27 2018	Brief amicus curiae of The Islam and Religious Freedom Action Team of the Religious Freedom Institute filed. VIDED **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 27 2018	Brief amicus curiae of International Municipal Lawyers Association filed. VIDED. **Main Document** **Certificate of Word Count** **Proof of Service** **Other**
Jul 27 2018	Brief amici curiae of 109 United States Senators and Members of the United States House of Representatives filed. VIDED. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 27 2018	Brief amici curiae of State of West Virginia, 27 Other States & the Governor of Kentucky filed. VIDED. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 27 2018	Brief amici curiae of Maryland Elected Officials filed. VIDED **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 27 2018	Brief amici curiae of Medal of Honor Recipients filed. VIDED. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 27 2018	Brief amici curiae of Veterans of Foreign Wars of the United States, et al. filed. VIDED. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 27 2018	Brief amicus curiae of The Town of Taos, New Mexico filed. VIDED. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 27 2018	Corrected brief amici curiae of The Becket Fund for Religious Liberty filed. VIDED. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 01 2018	Brief amicus curiae of Foundation for Moral Law filed. **Main Document** **Certificate of Word Count** **Proof of Service**

Aug 02 2018	Brief amicus curiae of Prince George's County, Maryland filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 02 2018	Brief amicus curiae of The Rutherford Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 02 2018	Brief of respondents American Humanist Association, et al. in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 02 2018	Brief amicus curiae of State of Maryland filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 02 2018	Brief amici curiae of Veterans in Defense of Liberty, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 21 2018	Reply of petitioner Maryland-National Capital Park and Planning Commission filed. **Main Document** **Certificate of Word Count** **Certificate of Word Count**
Aug 22 2018	DISTRIBUTED for Conference of 9/24/2018.
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Oct 09 2018	DISTRIBUTED for Conference of 10/12/2018.
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Oct 29 2018	DISTRIBUTED for Conference of 11/2/2018.
Nov 02 2018	Petition GRANTED. The petition for a writ of certiorari in No. 17-1717 is granted. The cases are consolidated and a total of one hour is allotted for oral argument. VIDED.
Nov 02 2018	Because the Court has consolidated these cases for briefing and oral argument, future filings and activity in the cases will now be reflected on the docket of No. 17-1717. Subsequent filings in these cases must therefore be submitted through the electronic filing system in No. 17-1717. Each document submitted in connection with one or more of these cases must include on its cover the case number and caption for each case in which the filing is intended to be submitted. Where a filing is submitted in fewer than all of the cases, the docket entry will reflect the case number(s) in which the filings is submitted; a document filed in all of the consolidated cases will be noted as "VIDED."
Dec 21 2018	SET FOR ARGUMENT on Wednesday, February 27, 2019. VIDED.
Jan 11 2019	Record requested from the U.S.C.A. 4th Circuit.

Jan 15 2019	CIRCULATED
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No. 18-____

IN THE
Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Establishment Clause requires the removal or destruction of a 93-year-old memorial to American servicemen who died in World War I solely because the memorial bears the shape of a cross.

PARTIES TO THE PROCEEDING

The Maryland-National Capital Park and Planning Commission, petitioner on review, was the defendant-appellee below.

The American Humanist Association, Steven Lowe, Fred Edwords, and Bishop McNeill, respondents on review, were the plaintiffs-appellants below.

The American Legion, The American Legion Department of Maryland, and The American Legion Colmar Manor Post 131, respondents on review, intervened as defendants in the District Court and were defendant-appellees in the Court of Appeals.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES v
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL PROVISIONS INVOLVED 2
INTRODUCTION 2
STATEMENT 5
A. Factual Background 5
B. Procedural History 7
REASONS FOR GRANTING THE PETITION 12
I. THE FOURTH CIRCUIT'S DECISION IS PLAINLY WRONG 12
II. THE FOURTH CIRCUIT'S DECISION DEEPENS MULTIPLE CIRCUIT SPLITS 21
A. The Circuits Are Divided On Whether The Cross May Ever Serve As A Secular Symbol Of Commemoration 22
B. The Circuits' Division Rests On Several Basic Disagreements As To The Meaning Of This Court's Establishment Clause Precedents 27

TABLE OF CONTENTS—Continued

Page

1. The circuits disagree on whether a commemorative cross necessarily conveys a religious message 27
2. The circuits disagree on what knowledge to attribute to the "reasonable observer" 29
3. The circuits disagree on the relevance of a monument's longevity and history 31

III. THE QUESTION PRESENTED IS IMPORTANT 33

CONCLUSION 36

APPENDIX

APPENDIX A—Fourth Circuit's Opinion (Oct. 18, 2017) 1a

APPENDIX B—District Court's Opinion (Nov. 30, 2015) 53a

APPENDIX C—Order and Opinions Denying Rehearing En Banc (Mar. 1, 2018) 86a

TABLE OF AUTHORITIES

Page(s)

CASES:

ACLU Nebraska Found. v. *City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) 32

Aguilar v. *Felton*, 473 U.S. 402 (1985) 21

Am. Atheists, Inc. v. *Davenport*, 637 F.3d 1095 (10th Cir. 2010) ..... *passim*

Am. Atheists, Inc. v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227 (2d Cir. 2014) 26, 27, 28

Ams. United for Separation of Church & State v. *City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) 30

Briggs v. *Mississippi*, 331 F.3d 499 (5th Cir. 2003) 26, 27

Buono v. *Kempthorne*, 502 F.3d 1069 (9th Cir. 2007) 23

Buono v. *Norton*, 371 F.3d 543 (9th Cir. 2004) 8, 23

Capitol Square Review & Advisory Bd. v. *Pinette*, 515 U.S. 753 (1995) 19

Carpenter v. *City & Cty. of San Francisco*, 93 F.3d 627 (9th Cir. 1996) 31

Chabad-Lubavitch of Ga. v. *Miller*, 5 F.3d 1383 (11th Cir. 1993) 30

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Page(s)

Cty. of Allegheny v. *Am. Civil Liberties Union*,
492 U.S. 573 (1989) 13, 15

Eugene Sand & Gravel, Inc. v. *City of Eugene*,
558 P.2d 338 (Or. 1976) 22

Freethought Soc'y of Greater Phil. v. *Chester Cty.*,
334 F.3d 247 (3d Cir. 2003) 30

Green v. *Haskell Cty. Bd. of Comm'rs*,
568 F.3d 784 (10th Cir. 2009) 29

Lee v. *Weisman*,
505 U.S. 577 (1992) 3, 11, 18

Lynch v. *Donnelly*,
465 U.S. 668 (1984) ..... *passim*

Mount Soledad Mem'l Ass'n v. *Trunk*,
132 S. Ct. 2535 (2012) 12

Murray v. *City of Austin*,
947 F.2d 147 (5th Cir. 1991) 26, 29, 31

Rowan Cty. v. *Lund*,
No. 17-565, 2018 WL 3148570 (U.S. June 28, 2018) 35

Salazar v. *Buono*,
559 U.S. 700 (2010) ..... *passim*

Separation of Church & State Comm. v. *City of Eugene*,
93 F.3d 617 (9th Cir. 1996) 22, 23, 35

TABLE OF AUTHORITIES—Continued

Page(s)

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461 F.3d 504 (5th Cir. 2006) 31

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134 S. Ct. 1811 (2014) 20

Trunk v. *City of San Diego*,
629 F.3d 1099 (9th Cir. 2011) ..... *passim*

Trunk v. *City of San Diego*,
660 F.3d 1091 (9th Cir. 2011) 24, 32, 34

Utah Highway Patrol Ass'n v. *Am. Atheists, Inc.*,
132 S. Ct. 12 (2011) 30, 35

Van Orden v. *Perry*,
545 U.S. 677 (2005) ..... *passim*

Weinbaum v. *City of Las Cruces*,
541 F.3d 1017 (10th Cir. 2008) 28

STATUTE:

28 U.S.C. § 1254(1) 2

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. I 2

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OTHER AUTHORITIES:

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Page(s)

Other Poems (G.P. Putnam's Sons ed., 1919) 5

IN THE

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No. 18-

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

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AMERICAN HUMANIST ASSOCIATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Maryland-National Capital Park and Planning Commission (the Commission) respectfully petitions for a writ of certiorari to review the judgment of the Fourth Circuit in this case.

OPINIONS BELOW

The Fourth Circuit's opinion (App. 1a-52a) is reported at 874 F.3d 195. The District Court's opinion (App. 53a-85a) is reported at 147 F. Supp. 3d 373. The Fourth Circuit's order and opinions denying rehearing en banc (App. 86a-105a) are reported at 891 F.3d 117.

JURISDICTION

The Fourth Circuit entered judgment on October 18, 2017. Petitioner filed a timely petition for rehearing en banc, which was denied on March 1, 2018. On May 9, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 29, 2018. *See* No. 17A1175. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Establishment Clause of the First Amendment, U.S. Const. amend. I, provides:

> Congress shall make no law respecting an establishment of religion.

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

INTRODUCTION

In this case, the Fourth Circuit ordered the removal or destruction of a 93-year-old memorial to the veterans of Prince George's County, Maryland, who perished in World War I, solely because the memorial bears the shape of a Latin cross. In an opinion that ultimately splintered the Fourth Circuit 8-6, the panel reasoned that the Latin cross is the "preeminent symbol of Christianity." App. 20a. Accordingly, it concluded, virtually no amount of secular content, context, and history—including the monument's exclusively secular dedication and inscriptions; its

placement alongside other secular war memorials in Veterans Memorial Park; its consistent use as a site for patriotic events for nearly a century; and the history of the Latin cross as a symbol of the World War I dead—could render the memorial a nonsectarian symbol of commemoration. App. 20a-31a.

That decision is, to be blunt, grievously incorrect. This Court has time and again made clear that the Establishment Clause "does not require eradication of all religious symbols in the public realm." *Salazar* v. *Buono*, 559 U.S. 700, 718 (2010) (plurality opinion) (citing *Lee* v. *Weisman*, 505 U.S. 577, 598 (1992)). Rather, this Court has recognized that passive displays—particularly displays that have stood without challenge for decades—may constitutionally employ religious symbols in order to convey a predominantly nonreligious message. *See Lynch* v. *Donnelly*, 465 U.S. 668, 678-679 (1984). It is difficult to conceive of a monument whose content, context, and history more clearly convey a nonsectarian message of remembrance and respect than this one. The Fourth Circuit's holding that the mere use of a cross tars this memorial as an unconstitutional establishment of religion "has no place in our Establishment Clause traditions," and will engender the very sort of "religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden* v. *Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring).

The Fourth Circuit's decision also continues a worrying trend in the lower courts. Despite this Court's pronouncements, several circuits, including the Ninth, the Tenth, and the Fourth, have adopted an effectively *per se* prohibition on the use of crosses as

secular symbols of commemoration. The Ninth Circuit has issued an unbroken string of decisions invalidating every cross-shaped war memorial it has encountered, including some, like the Peace Cross, that are nearly a century old. *See Trunk* v. *City of San Diego*, 629 F.3d 1099, 1110-12 (9th Cir. 2011). Likewise, the Tenth Circuit has effectively adopted a "presumption of unconstitutionality" for commemorative crosses. *Am. Atheists, Inc.* v. *Davenport*, 637 F.3d 1095, 1102-03 (10th Cir. 2010) (Kelly, J., joined by Gorsuch, J., dissenting from denial of rehearing en banc). These decisions split from the approaches taken by other circuits, including the Second and Fifth, that have recognized that the Latin cross may, in appropriate contexts, convey a nonsectarian message of commemoration. And they rest on multiple outlier understandings of this Court's Establishment Clause precedents that other circuits have properly rejected.

This Court's intervention is urgently needed. If permitted to stand, the Fourth Circuit's decision will compel the removal or dismemberment of a cherished war memorial that has served as a site of solemn commemoration and civic unity for nearly a century. It will deepen division among the circuits on questions of profound importance to state and municipal governments. And it will imperil "hundreds of monuments with similar symbols standing on public grounds," including "those in nearby Arlington National Cemetery, where crosses of comparable size stand in commemoration of fallen soldiers." App. 101a (Niemeyer, J., dissenting from denial of rehearing en banc).

STATEMENT

A. Factual Background

The United States' entry into World War I led to death on a scale that America had not witnessed since the Civil War. In little over a year, more than 300,000 American soldiers were killed or wounded in Europe. An enduring symbol of this sudden and brutal loss of life became the Latin cross, which marked the graves of countless servicemen overseas. App. 77a-78a. Widely published photographs recorded the rows of wooden crosses commemorating the soldiers who perished at Argonne and Flanders Field. D. Ct. Dkt. 83-5, at 12-21. And the poet John McCrae wrote, in a celebrated remembrance, of "the crosses, row on row, / That mark our place * * * We are the Dead." John McCrae, In Flanders Fields (1915), *reprinted in* In Flanders Fields and Other Poems 3 (G.P. Putnam's Sons ed., 1919).

Almost a century ago, in 1925, the American Legion and a group of bereaved mothers erected a memorial in Bladensburg, Maryland, to honor the forty-nine men from Prince George's County who died in World War I. App. 55a-59a. To evoke the grave markers on the battlefields of Europe, the memorial bears the shape of a cross. App. 54a. It has no religious text or content. At its base, a large plaque lists the names of the dead, and contains a dedication to "the heroes of Prince George's County Maryland who lost their lives in the Great War for the liberty of the world." App. 55a. The plaque also bears a quotation from President Wilson, stating that "[t]he right is more precious than peace." App. 44a. Four words are inscribed on the monument, one on each face: "valor; endurance; courage; devotion."

App. 55a. The symbol of the American Legion is displayed at the monument's center, and an American flag flies at one side. *Id.*

In the decades since this monument, commonly referred to as the "Peace Cross," was erected, other memorials have been built nearby to honor the veterans and fallen of other conflicts—a collection now known as Veterans Memorial Park. App. 60a. In 1944, a local American Legion post constructed a monument 200 feet south of the Peace Cross to honor the men and women of Prince George's County who died in World War II. *Id.* On July 4, 1983, a monument was constructed beside the World War II memorial to honor the veterans of the Korean and Vietnam Wars. App. 60a-61a. Other memorials within this small park commemorate the War of 1812, the victims of Pearl Harbor, and the lives lost on September 11, 2011. App. 9a, 60a-61a. Recently, the community added two thirty-eight-foot-tall statutes of soldiers who fought in the Battle of Bladensburg. App. 61a.

From its inception, and up through the present day, the Peace Cross has consistently been used by the local community as the site of patriotic events to honor the Nation's veterans. App. 61a-62a. These events usually take place on Veterans Day or Memorial Day, and typically follow the same format: there is the presentation of colors, a singing of the national anthem, an invocation, a keynote speaker—often a veteran or military official—a song or readings, the laying of a wreath or flowers, a benediction, and a reception. App. 62a. No religious ceremony has ever been held at the memorial. *Id.* The only mention of a religious event of any kind occurred 87 years ago,

and there is no record that the event actually took place. *Id.* Until the present suit, no one ever challenged the monument's legality. App. 23a.

In 1961, the Commission acquired the Peace Cross in order to preserve the monument and address traffic safety concerns arising from the expansion of a nearby roadway. App. 59a-60a, 72a. When the Commission obtained the Peace Cross, the American Legion reserved the right to "to hold memorial services to departed veterans and other ceremonies" at the memorial. App. 60a. Today, the Commission funds routine maintenance and lighting of the Peace Cross, which is listed on the National Register of Historic Places and forms a part of the Star Spangled Banner National Historic Trail. App. 63a; *see* D. Ct. Dkt. 86-9, 86-11. The Commission has expended or budgeted roughly $217,000 in recent decades to refurbish the monument and ensure its continued preservation. App. 63a.

B. Procedural History

1. In 2014, the American Humanist Association and three local residents sued the Commission. They contended that, because of its shape, the Peace Cross constitutes an unconstitutional endorsement of Christianity, and asked that the court order the Commission to "remove" the memorial, "demolish" it, or "remove [its] arms *** to form a non-religious slab." D. Ct. Dkt. 78, at 2. The American Legion and its local affiliates intervened as defendants, and the parties cross-moved for summary judgment.

The District Court granted summary judgment to the defendants. The court found "overwhelming evidence" that "the predominant purpose of the [Peace Cross] was for secular commemoration." App.

73a. Furthermore, it found that the monument's "history and context"—including the numerous "secular elements" on its face, the "secular memorials" that surround it, the monument's "nearly exclusive use" as a war memorial "for its entire history," and the absence of any legal challenge for nearly nine decades—made clear to any "reasonable observer" that the Peace Cross does not serve to "endors[e] religion." App. 77a-83a.

2. A divided panel of the Fourth Circuit reversed. Writing for the majority, Judge Thacker "s[aw] fit to apply *Lemon* in this case." App. 17a. The panel acknowledged that the memorial "satisfied the first prong of *Lemon*": The Commission had "obtained the Cross" to "maint[ain] *** safety near a busy highway intersection," and it "preserve[d] the memorial to honor World War I soldiers," both plainly "legitimate secular purposes." App. 19a. But the panel concluded that the memorial "fails the second and third prongs of *Lemon*" because it "endorses Christianity—not only above all other faiths, but also to their exclusion." App. 28a, 31a.

The panel rested this conclusion on a single, overriding consideration: that the Memorial bears the shape of a large cross. "The Latin cross," the panel reasoned, "is the 'preeminent symbol of Christianity.'" App. 20a (quoting *Buono* v. *Norton*, 371 F.3d 543, 545 (9th Cir. 2004)). Although a cross "may generally serve as a symbol of death and memorialization," the court continued, "it only holds value as a symbol of death and resurrection *because* of its affiliation with the crucifixion of Jesus Christ." App. 20a-21a. Thus, the panel concluded, "[e]ven in the memorial context, a Latin cross serves not simply as

a generic symbol of death, but rather a Christian symbol of the death of Jesus Christ." App. 21a.

The panel found that neither the history of the Peace Cross nor its secular content and context altered this exclusively religious meaning. The historical use of the cross "as a commemorative symbol of World War I" was "of no moment," the panel reasoned, because crosses "on World War I battlefields were *individual*—rather than universal—memorials to the lives of Christian soldiers." App. 21a-22a. Likewise, it was immaterial that the Peace Cross had "stood unchallenged for 90 years," and "primarily" been used for "veteran-focused ceremonies" throughout that time. App. 23a. The "invocations and benedictions" at veterans' events, the panel stated, were themselves "group prayer[s]." *Id.* And, notwithstanding *Van Orden*, it was "too simplistic" to consider the monument's long history without challenge to be evidence of its "secular effect." App. 23a-24a. "Perhaps the longer the violation persists," the panel countered, "the greater the affront to those offended." *Id.*

The panel likewise discounted the monument's exclusively secular content and context. "Admittedly," the panel said, "the Cross contains a few secular elements," including "the plaque," "the Legion symbol," "the words 'valor,' 'endurance,' 'courage,' and 'devotion' inscribed on its base," the "American flag flying in its vicinity", and "its location in the Veterans Memorial Park." App. 24a. But the panel expressed concern that "passers-by" might not view all of the monument's secular features, since it is "located in a high-traffic area" where "one could [not] easily park," and the plaque is "weathered" and once

was partially "obscured" by "bushes." App. 24a-26a (citing *Davenport*, 637 F.3d at 1121). In addition, the panel noted that the Peace Cross is taller and more "prominent" than the surrounding monuments, which the panel thought "evoke[d] a message of aggrandizement and universalization of religion." App. 24a-25a (quoting *Trunk*, 629 F.3d at 1116 n.18)).

Thus, the panel held, "the Cross * * * ha[s] the primary effect of endorsing religion." App. 27a. And, for much the same reason, the panel found that the Commission's maintenance of the Peace Cross resulted in "excessive entanglement between government and religion." App. 30a. By expending even "de minimis" funds to preserve the monument, the panel said, the Commission impermissibly "promot[ed] * * * a religious doctrine, Christianity." App. 30a-31a & n.18. It concluded that the Commission's ownership of the memorial "says to any reasonable observer that the Commission either places Christianity above other faiths, views being American and Christian as one in the same, or both." App. 31a.

Chief Judge Gregory dissented. He explained that "the Supreme Court has consistently concluded that displays with religious content—but also with a legitimate secular use—may be permissible under the Establishment Clause." App. 43a (internal quotation marks omitted). That principle resolved this case: Through its "appearance, context, and factual background," the Peace Cross made clear to the reasonable observer that "the Memorial, while displaying a religious symbol, is a war memorial built to celebrate the forty-nine Prince George's County residents who gave their lives in battle."

App. 44a-45a, 49a (emphasis omitted). The majority's conclusion that "the size of the Latin cross * * * overwhelms these secular elements," Chief Judge Gregory wrote, "would lead to per se findings that all large crosses are unconstitutional despite any amount of secular history and context." App. 44a-45a.

3. The Fourth Circuit voted 8-6 to deny rehearing en banc. Judge Wynn concurred in the denial of rehearing. He asserted that "sanctioning a governmental body's attempt to imbue a traditionally religious symbol, like the Latin cross, with secular meaning" would itself violate the First Amendment. App. 95a (quoting *Lee*, 505 U.S. at 608 (Blackmun, J., concurring)).

Chief Judge Gregory, Judge Wilkinson, and Judge Niemeyer all filed dissents. Chief Judge Gregory reiterated the views in his panel dissent, and stated that "wherever one's views fall on the matter, I am certain [the case] raises an important question worthy of the full Court's review." App. 98a. Judge Wilkinson agreed: "I would let the cross remain and let those honored rest in peace." App. 100a. Judge Niemeyer explained that "[i]t strains established judicial analysis to conclude that *Van Orden* does not allow the monument in this case to stand," given that every "observation[ ]" that Justice Breyer made of the monument in *Van Orden* is applicable to the Peace Cross, too. App. 105a. Judge Niemeyer added that, by striking down the memorial, the panel's decision "puts at risk hundreds, and perhaps thousands, of similar monuments," including "those in nearby Arlington National Cemetery, where crosses

of comparable size stand in commemoration of fallen soldiers." App. 101a, 105a.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION IS PLAINLY WRONG.

This should have been an easy case. The Peace Cross's dedications, its inscriptions, its context, and nearly a century of practice make abundantly clear that this monument was erected to serve—and, for 93 years, *has* served—as a secular commemoration of American servicemen who perished in World War I. The panel's conclusion that this cherished war memorial is in fact an effort to "aggrandize[]" Christianity defies common sense, and contradicts the long-settled understanding of the surrounding community. App. 31a. Furthermore, it flouts this Court's directive that the Establishment Clause "does not require eradication of all religious symbols in the public realm,"—including the Latin cross, which has attained a "historical meaning *** beyond the expression of religious views." *Buono*, 559 U.S. at 716-718.

The panel's decision to strike down a nearly century-old war memorial itself raises "a question of substantial importance." *Mount Soledad Mem'l Ass'n* v. *Trunk*, 132 S. Ct. 2535, 2535 (2012) (statement of Alito, J., respecting denial of certiorari). And its decision to do so on the basis of such clear errors of law is intolerable. This Court should grant certiorari and correct the Fourth Circuit's grievous error.

1. a. This Court has long made clear that, whatever its outer bounds, the Establishment Clause does not prohibit public displays that employ religious sym-

bolism where neither the purpose nor the primary effect of the display is to endorse religious belief or practice. *See Lynch*, 465 U.S. at 680-681. Every Justice to address the issue has agreed that such displays do not violate the Establishment Clause. *See, e.g.*, *Van Orden*, 545 U.S. at 691-692 (plurality opinion); *id.* at 703 (Breyer, J., concurring in the judgment); *Buono*, 559 U.S. at 747 n.7 (Stevens, J., dissenting). And, applying that principle, this Court has repeatedly affirmed the constitutionality of displays that use religious symbols to convey a nonsectarian message—from the crèche in *Lynch*, to the menorah in *County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. 573 (1989), to the text of the Ten Commandments in *Van Orden*.

That straightforward principle should have resolved this case. There is no dispute that the Commission's "purpose" in displaying the Peace Cross is wholly secular. App. 19a. The Commission assumed ownership of the Peace Cross in 1961 to promote traffic safety and historic preservation, and it maintains the memorial today to commemorate the men who died fighting in World War I. *Id.* As the panel conceded, those aims are both "secular" and plainly "legitimate." *Id.*

Furthermore, no objective observer who was aware of the memorial's content, context, and history would conclude that its effect is to endorse religion—let alone to proselytize or coerce religious practice. *See Buono*, 559 U.S. at 720-721. A large plaque on the front of the memorial expressly proclaims its secular purpose: to commemorate "the heroes of Prince George's County Maryland who lost their lives in the Great War for the liberty of the world." App. 55a.

Each of the memorial's faces honors one of the secular values that the war dead embody: "valor; endurance; courage; devotion." *Id.* The emblem of the American Legion, a civic organization dedicated to honoring the Nation's veterans, is prominently displayed on both sides. *Id.* And a secular quotation from President Wilson, declaring that "[t]he right is more precious than peace," is inscribed on the memorial's plaque. App. 44a. These dedications speak with a consistent voice, one wholly without religious content; they mark the Peace Cross as a war memorial commemorating the men who perished in World War I.

The shape of the memorial reaffirms that expressly secular meaning. While the Latin cross is "certainly a Christian symbol," no one aware of the background of the Peace Cross would think that it was erected "to promote a Christian message." *Buono*, 559 U.S. at 715. In 1925, the Latin cross was an indelible and widely recognized symbol of the servicemen who perished overseas fighting in World War I. *See id.* at 725 (Alito, J., concurring in part and concurring in the judgment). Poems, photographs, and other World War I memorials throughout the country regularly used this symbol as a simple marker of the dead. By using a cross to commemorate the forty-nine war dead of Prince George's County, the memorial "evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles," and seeks "simply to honor our Nation's fallen soldiers." *Id.* at 715, 721 (plurality opinion).

The "physical setting of the monument" confirms that it serves as a memorial to the fallen rather than an object of religious observance. *Van Orden*, 545

U.S. at 702 (Breyer, J., concurring). The Peace Cross is situated on a highway median that "suggests little or nothing of the sacred" and that "does not readily lend itself to meditation or any other religious activity." *Id.* Furthermore, it is located in the middle of Veterans Memorial Park, an area dedicated to the veterans and war dead of other national conflicts. This collection of war monuments, secular all, "communicates to visitors" a single consistent message: commemoration and respect for soldiers who died in the Nation's wars. *Id.*; *see Cty. of Allegheny*, 492 U.S. at 635 (O'Connor, J., concurring).

And, over the course of nearly a century, the community has made clear that it understands the Peace Cross to convey exactly that message. Since 1925, the Peace Cross has virtually exclusively been used for patriotic events honoring the Nation's veterans. App. 61a-62a. No religious event has been held at the site for at least 87 years, if ever. *Id.* Beginning in 1944, the community began to erect other war memorials around the Peace Cross, evidencing their understanding of the memorial as a commemorative, not religious, monument. And for the first 89 years of its history—and for 53 years after it was transferred to the Commission—no one challenged the monument's legality. This history testifies "more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting * * * to a government effort to favor a particular religious sect." *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring).

b. *Van Orden* confirms that the Peace Cross is constitutional. In his controlling concurrence in that

case, Justice Breyer determined that a Ten Commandments display on the Texas State Capitol grounds was constitutional because several considerations, taken together, made clear that the display "serv[ed] a primarily nonreligious purpose": (1) the monument "prominently acknowledge[d]" that it was donated by a "primarily secular" organization; (2) the monument's "physical setting" did not lend itself to religious activity or suggest the sacred; (3) the display was part of a collection of "monuments" and "historical markers" celebrating the "historical 'ideals' of Texans"; and (4) the monument had stood for forty years without challenge. 545 U.S. at 701-703.

Precisely the same factors are present here. The Peace Cross "prominently acknowledges" that it was donated by the American Legion, a civic organization that honors our Nation's veterans. Its physical setting on a highway median does not lend itself to religious activity. The monument is part of "Veterans Memorial Park," a collection of other "monuments" and "historical markers" to the Nation's conflicts. And the memorial stood for nearly ninety years without challenge.

If anything, the Peace Cross contains substantially more indicia of secular meaning than the monument in *Van Orden*. It has an expressly secular dedication, an inscription honoring secular values, and decades' worth of exclusively secular usage. As Judge Niemeyer explained, "[i]t strains established judicial analysis to conclude that *Van Orden* does not allow the monument in this case to stand." App. 105a.

2. The panel majority nonetheless concluded that this century-old war memorial is invalid, and must be "raz[ed]," have its arms "remov[ed]," or be subjected to "alternative arrangements that would not offend the Constitution." App. 31a-32a n.19. That judgment is deeply flawed.

a. The majority's principal rationale for invalidating the Peace Cross was the bare fact that it has the shape of a large Latin cross. App. 5a-6a. According to the panel, the Latin cross acquired its meaning as a symbol of death and remembrance from "its affiliation with the crucifixion of Jesus Christ." App. 20a-21a. Therefore, the panel reasoned, "[e]ven in the memorial context, a Latin cross serves not simply as a generic symbol of death, but rather a Christian symbol of the death of Jesus Christ." App. 21a.

That simply does not follow. This Court has repeatedly made clear that symbols that draw their core meaning from religion may also be used to convey a constitutionally permissible, nonsectarian message. In *Van Orden*, Justice Breyer explained that a display of the Ten Commandments—the text of which expressly "invok[es] *** the Deity" and prescribes rules of religious observance—conveyed a predominantly "secular moral message" when it appeared as part of a collection of secular monuments. 545 U.S. at 700-702. So too in *Lynch*, the Court held that a crèche sent a message of pluralism, rather than religious devotion, when it appeared among a collection of symbols honoring the winter holidays. 465 U.S. at 680-681.

The Latin cross, no less than these other symbols, can convey a nonreligious message as well as a religious one. Indeed, in *Buono*, a plurality of the

Court recognized that the cross does not serve "merely [as] a reaffirmation of Christian beliefs" when used to commemorate the fallen of World War I. 559 U.S. at 721. Rather, it sends a message of "honor and respect" for "those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." *Id.* The erection of a cross-shaped monument to the men who died in World War I thus "evokes far more than religion"; "[i]t evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten." *Id.*

The panel majority overlooked this secular meaning—one well-known at the time of the Peace Cross's construction—and instead "concentrated solely on the religious aspects of the cross, divorced from its background and context." *Id.* But this Court's precedents do not permit such categorical hostility to the use of "religious symbols in the public realm." *Id.* at 718 (citing *Lee*, 505 U.S. at 598). The court should have examined the display as a whole, in light of its background and history, to determine whether the "nonreligious aspects" of its message "predominate" over its religious associations. *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring). Here, they plainly do: If even a bare, unadorned cross in the desert could convey a nonreligious message of remembrance, *see Buono*, 559 U.S. at 715-716, 721, then a monument that contains multiple express declarations of its secular purpose, supported by nearly a century of practice, surely does so, as well. *See id.* at 747 n.7 (Stevens, J., dissenting) (stating that, when

used as part of a "more elaborate monument," a cross can "convey a primarily nonreligious message").

b. The panel compounded its error by discounting many of the monument's "[a]dmittedly *** secular elements." App. 24a. By the panel's logic, a "reasonable observer" might not notice the cross's plaque, inscription, and surroundings because the cross is "located in a high-traffic area" where one cannot "easily park"; the plaque is "weathered"; the base of the monument was at one time "obscured" by bushes; and some of the other memorials are up to a "half-mile" away. App. 24a-27a. The panel thought that "passers-by" might therefore fail to "read the plaque" or accurately ascertain the monument's secular context. App. 25a.

But that is simply not the way the "reasonable observer" test works. The "reasonable observer" is not a "casual passerby" with partial knowledge of the challenged display. *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring). She is a "personification of the community ideal of reasonable behavior," one who is acquainted with all of the relevant facts, history, and circumstances. *Id.* at 779-780; *see Buono*, 559 U.S. at 720-721. The "reasonable observer" accordingly would not be concerned with such minutiae as the availability of parking and the height of the bushes. She would fairly assess all indicia of the monument's meaning, even those not easily visible at a moment's glance—all of which powerfully attest to the monument's secular meaning.

c. Finally, the panel erred by declining to place any weight on the monument's nine decades of exclusive-

ly secular history.[1] It rejected as "too simplistic" the notion that this history weighed in favor of the monument's constitutionality, opining that it could just as easily be said that "the longer a violation persists, the greater the affront to those offended." App. 23a-24a. This Court, however, has previously said the opposite: In *Van Orden*, Justice Breyer's controlling concurrence deemed it "determinative" that the monument at issue had stood for four decades without challenge. 545 U.S. at 702. Likewise, in *Buono*, the plurality explained that "[t]ime * * * ha[d] played its role" in shaping the meaning of the memorial at Sunrise Rock, giving it a "historical meaning" as a place in which the public came to "pay * * * respects" and "honor[]" the war dead. 559 U.S. at 716; *see also Lynch*, 465 U.S. at 684. The panel could not simply ignore these holdings, and treat the monument's history as a reason for subjecting it to *greater* scrutiny. App. 23a-24a.[2]

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[1] The panel's suggestion that the monument's history is only "semisecular" was unfounded. App. 23a. The panel said that "the Cross has been the scene of Christian activities" because of a single newspaper advertisement regarding one religious event 87 years ago. *Id.* And the panel wrongly characterized the "invocations and benedictions" at annual Veterans Day and Memorial Day ceremonies as illicit "group prayer[s]." *Id.*; *cf. Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1818-19 (2014).

[2] The panel's holding (at App. 30a) that the Peace Cross entails "entanglement between government and religion" cannot sustain any weight. The panel rested that holding entirely on the erroneous premise that the memorial "embodies promotion of a religious doctrine." App. 30a-31a & n.18. And even on that premise, the panel's conclusion was wrong; the de minimis expenditure of funds to maintain a monument does not entail the sort of "pervasive monitoring by public authorities * * * of

In the end, the panel's holding would invite the very "kind of social conflict the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring). Its decision would compel the removal or destruction of a monument that has served as a source of civic unity for 93 years, stripping Bladensburg of a site of remembrance and mourning, and "conveying disrespect for those the cross [is] seen as honoring." *Buono*, 559 U.S. at 716. Furthermore, is decision will inevitably "encourage disputes concerning the removal" of other cross-shaped war memorials throughout the Fourth Circuit. *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring); *see infra* pp. 33-35. That sort of divisiveness and destruction toward our Nation's historical landmarks "has no place in our Establishment Clause traditions." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring). The Court should grant the writ and correct the Fourth Circuit's serious error.

II. THE FOURTH CIRCUIT'S DECISION DEEPENS MULTIPLE CIRCUIT SPLITS

Certiorari is also warranted because the Fourth Circuit's decision continues a worrying trend in the lower courts. Multiple circuits, including the Ninth, the Tenth, and now the Fourth, have adopted what amounts to a virtual *per se* prohibition on the use of crosses as symbols of commemoration. That rule sharply divides from the approach taken by other courts, including the Second and Fifth Circuits,

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religious matter" or "religious thought" required to implicate entanglement concerns. *Aguilar* v. *Felton*, 473 U.S. 402, 413 (1985).

which have upheld cross-shaped displays where context and history make clear that they are intended to serve as secular symbols of commemoration. And it rests on multiple erroneous understandings of this Court's Establishment Clause precedents that other circuits have properly rejected.

A. The Circuits Are Divided On Whether The Cross May Ever Serve As A Secular Symbol Of Commemoration.

The circuits have sharply split as to the permissibility of ever using the cross as a commemorative symbol.

1. a. The Ninth Circuit began applying a virtual *per se* prohibition on cross-shaped monuments in *Separation of Church & State Committee* v. *City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (per curiam). There, the court considered the constitutionality of the Veterans Memorial Cross in Eugene, Oregon. That memorial was donated by the American Legion, was marked with a plaque containing a dedication to the veterans of all wars, prominently featured the words "Bravely They Died, Honored They Rest," and was used only for secular commemorative events. *Eugene Sand & Gravel, Inc.* v. *City of Eugene*, 558 P.2d 338, 344 (Or. 1976). In 1976, the Oregon Supreme Court had upheld this cross on the ground that its content and usage made clear that it was maintained for "the secular purpose" of honoring war veterans, and served as a nonreligious "symbol of sacrifice" akin to other "large monuments with crosses in military cemeteries." *Id.* at 346-347. In a brief per curiam opinion, the Ninth Circuit invalidated the memorial. Its reasoning consisted of one sentence: "There is no question that the Latin cross

is a symbol of Christianity," it stated, and thus "its placement on public land by the City of Eugene violates the Establishment Clause. *City of Eugene*, 93 F.3d at 620.

The Ninth Circuit subsequently applied that syllogism to invalidate another cross-shaped war memorial in *Buono* v. *Norton*, 371 F.3d 543 (9th Cir. 2004) ("*Buono I*"). In that case, the memorial at issue was erected in 1934 by the Veterans of Foreign Wars, contained a plaque identifying it as a war memorial, had been used for decades as a place to commemorate veterans, and was designated by Congress as a federal memorial for World War I veterans. *Id.* at 548-549. The Ninth Circuit stated that all of this context was "of no moment." *Id.* at 549. Its analysis, it said, was "squarely controlled" by the one-sentence holding in *City of Eugene*, because this too was a "cross * * * on publicly-owned land." *Id.* at 548.

The Ninth Circuit reapplied this holding in *Buono* v. *Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), *amended*, 527 F.3d 758 (9th Cir. 2008) ("*Buono II*"). In the intervening four years, Congress had attempted to address the Ninth Circuit's concerns in *Buono I* by enacting a statute transferring the monument to private land. *Id.* The Ninth Circuit, however, held that this transfer "d[id] nothing to minimize the impermissible government endorsement," and enjoined the statute. *Id.* at 1086. This Court reversed: It explained that the Ninth Circuit had taken "insufficient account of the context" and "historical meaning" of the memorial, and noted that the underlying decision in *Buono I* "may be questionable," as well. *Buono*, 559 U.S. at 715-718.

Undeterred, the Ninth Circuit invalidated yet another decades-old war memorial in *Trunk*. That memorial was originally erected on Mount Soledad in 1913, was "the centerpiece of a more extensive war memorial," had been the site of regular veterans' services for decades, and was acquired by Congress in 2006 specifically to preserve it as a memorial honoring the Nation's veterans. 629 F.3d at 1102-05. The Ninth Circuit struck down the monument, applying what it characterized as the "straightforward" rule set forth in its precedents: the Latin cross, it said, is "sectarian in nature," and does not "possess[] an ancillary meaning as a secular war memorial." *Id.* at 1112. Five judges dissented from denial of rehearing en banc, summarizing the Circuit's rule as: "a cross is a cross is a cross." *Trunk* v. *City of San Diego*, 660 F.3d 1091, 1091 (9th Cir. 2011) (Bea, J., dissenting from denial of rehearing en banc).

b. The Tenth Circuit has taken a similarly categorical approach. In *Davenport*, the court considered the constitutionality of Utah's display of Latin crosses to memorialize fallen highway patrol officers. 637 F.3d at 1111. These crosses, like the war memorials in *Buono* and *Trunk*, contained multiple secularizing details, including the biographical information of the fallen officers and the insignia of the Utah Highway Patrol. *Id.* at 1121-22. The court, however, reasoned that the cross is not a "*generic* symbol of death" but a "*Christian* symbol of death," and thus its use as a symbol of commemoration "can[not] be divorced from its religious significance." *Id.* at 1122. Dissenting from denial of rehearing en banc, Judge Kelly, joined by then-Judge Gorsuch, criticized this "presumption of unconstitutionality," explaining that it led the

court to "promptly disregard" every "contextual element[ ]" demonstrating the crosses' secular effect. *Id.* at 1102-03 (Kelly, J., dissenting from denying of rehearing en banc).

c. In the decision below, the Fourth Circuit expressly aligned itself with the views of the Ninth and Tenth Circuits. Invoking *Buono, Trunk*, and *Davenport*, it asserted that the Latin Cross is "'the preeminent symbol of Christianity,'" not "a generic symbol of death," and that its sectarian meaning "overshadows [the Peace Cross's] secular elements." App. 20a-21a, 26a (citation omitted). Applying that principle, the Court then invalidated the Peace Cross—a monument laden with as many indicia of secular meaning as could reasonably be imagined. As Chief Judge Gregory explained, the Circuit's newfound rule will thus lead—as it has done in the Ninth Circuit—"to per se findings that all large crosses are unconstitutional despite any amount of secular history and context." App. 45a.

2. In contrast, the Second Circuit and the Fifth Circuit (and, as noted above, the Oregon Supreme Court), have upheld the use of crosses where context and history make clear that they are intended as secular symbols of commemoration.

In *American Atheists, Inc.* v. *Port Authority of New York and New Jersey*, 760 F.3d 227 (2d Cir. 2014), the Second Circuit upheld the display of a cross-shaped memorial at the September 11 Museum. That memorial, which consisted of two girders welded in the shape of a Latin cross, had been recovered from the ruins of the World Trade Center, and was treated by some rescue workers as a devotional object. *Id.* at 233-234. The Second Circuit explained

that a reasonable observer "would be familiar not only with the religious symbolism of a Latin cross and the devotional use made of The Cross at Ground Zero," but also the secular context in which it appeared at the Museum. *Id.* at 241. That context included a plaque indicating that the cross was displayed to provide "an accurate historical account of events relating to September 11," the absence of any nearby "Christian iconography," the fact that the Ground Zero cross was widely understood as "an inclusive symbol for any persons seeking hope and comfort," and the surrounding exhibits displaying "various means that people employed to come to terms with the attacks' devastation." *Id.* at 241-244. Together, the court held, this context made clear that the cross's purpose was "not [a] divisive one of promoting religion over nonreligion." *Id.* at 244.

The Fifth Circuit has also upheld the display of crosses used as symbols of historical commemoration. In *Murray* v. *City of Austin*, 947 F.2d 147 (5th Cir. 1991), the court upheld the display of a Latin cross in the town seal of Austin, Texas. *Id.* at 149. The court acknowledged that the symbol was "a Christian cross," and that it had been adapted from Stephen Austin's coat of arms, where it had the religious purpose of commemorating Austin's ancestor's participation in a crusade. *Id.* at 150-151. But the court found it dispositive that the town itself had no "improper purpose in adopting the insignia," that the seal enjoyed a "long and unchallenged use," that it had a "non-proselytizing effect," and that removing the cross would "arguably evince[ ] not neutrality, but instead hostility, to religion." *Id.* at 158. Similarly, in *Briggs* v. *Mississippi*, 331 F.3d 499 (5th Cir. 2003), the Fifth Circuit upheld the use of the St.

Andrew's Cross in the Mississippi state flag. Although St. Andrew—one of the twelve apostles—was a religious figure, the court explained, the flag's "objective meaning in the community" was nonreligious, and any religious endorsement it entailed was "at most indirect, remote and incidental." *Id.* at 507.

B. The Circuits' Division Rests On Several Basic Disagreements As To The Meaning Of This Court's Establishment Clause Precedents.

The circuits' division on this important question proceeds from at least three fundamental disagreements on the meaning of this Court's Establishment Clause precedents. The Ninth, Tenth, and Fourth Circuits have all taken outlier views on the nature of the endorsement inquiry: These courts have held that the commemorative use of the cross is inseparable from its religious meaning; that the reasonable observer is akin to a selectively informed "passerby"; and that a monument's longstanding history without challenge is irrelevant—or even detrimental—to its constitutionality under the Establishment Clause. Other circuits have properly declined to adopt those views.

1. The circuits disagree on whether a commemorative cross necessarily conveys a religious message.

First, the circuits' division stems from a fundamental disagreement as to whether the Latin cross itself can ever convey a meaning that is not predominantly religious.

The Ninth, Tenth, and Fourth Circuits have each held that the commemorative meaning of the Latin

cross is inherently and overwhelmingly sectarian. In *Trunk*, the Ninth Circuit flatly stated that while "[t]he Latin cross can *** serve as a powerful symbol of death and memorialization," it necessarily "remains a sectarian, Christian symbol." 629 F.3d at 1116. Likewise, the Tenth Circuit held in *Davenport* that secular details on a cross cannot "nullifly] [its] religious sectarian content because a memorial cross is not a *generic* symbol of death; it is a Christian symbol of death." 637 F.3d at 1122.[3] The Fourth Circuit applied nearly identical language in the decision below: "Even in the memorial context," it stated, "a Latin cross serves not simply as a generic symbol of death, but rather a Christian symbol of the death of Jesus Christ." App. 21a.

In contrast, the Second and Fifth Circuits—like the plurality in *Buono*—have rejected this rigid view of the cross's meaning. In *American Atheists*, the Second Circuit held that the commemorative use of the Latin cross does not necessarily "derive[] from its religious symbolism and devotional use"; rather, the court explained, the cross may be used to convey a meaning that is "historical rather than theological." 760 F.3d at 239-240. Similarly, the Fifth Circuit has

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[3] The Tenth Circuit distinguished its earlier decision in *Weinbaum* v. *City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008), in which the court held that the City of Las Cruces could use a cross in its seal because the seal's "symbolism [wa]s not religious *at all*," and instead served simply as a "pictograph *** for a city named 'The Crosses.'" *Id.* at 1033, 1035 (emphasis added). In contrast, *Davenport* reasoned, the use of the cross as a "symbol of death" necessarily conveys a meaning that "can[not] be divorced from its religious significance." 637 F.3d at 1122.

held that a "Christian cross" need not "demonstrate[] a preference for Christianity," but may simply serve to commemorate a municipality's "unique role and history." *Murray*, 947 F.2d at 150, 155.

2. The circuits disagree on what knowledge to attribute to the "reasonable observer."

The circuits have also reached divergent results because they fundamentally disagree on what knowledge to attribute to the "reasonable observer."

Both the Tenth and the Fourth Circuits understand the reasonable observer as an ordinary "passerby" who may fail to notice secularizing details that are not plainly visible. In *Davenport*, the Tenth Circuit held that a reasonable observer would not take account of the nonreligious details on a roadside cross because "a motorist driving by one of the memorial crosses at 55-plus miles per hour may not notice, and certainly would not focus on," such information. 637 F.3d at 1121; *see Green* v. *Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 802 (10th Cir. 2009) (stating that a reasonable observer may have a "mistaken impression" about a monument's context). Similarly, in the decision below, the Fourth Circuit held that a reasonable observer would not "read the plaque" on the Peace Cross or view the surrounding monuments because the memorial is "located in a high-traffic area," it is difficult to "park," and the plaque is too "small" and "weathered." App. 24a-26a (citing *Davenport*, 637 F.3d at 1121).

Other circuits have rejected this cramped notion of the reasonable observer. The Third Circuit, for instance, has stated that the reasonable observer is a person who is "presumed to have an understanding

of the general history of the display and the community in which it is displayed," and who is "*more knowledgeable than the uninformed passerby.*" *Freethought Soc'y, of Greater Phila.* v. *Chester Cty.*, 334 F.3d 247, 259 (3d Cir. 2003) (emphasis added). The Sixth Circuit has likewise "reject[ed] the definition of the reasonable observer" as a person who "ha[s] no knowledge beyond what appears upon seeing" a display, or who fails to "*come close enough to * * * read [a] sign.*" *Ams. United for Separation of Church & State* v. *City of Grand Rapids*, 980 F.2d 1538, 1549-50 (6th Cir. 1992) (en banc) (emphasis added). Similarly, the Eleventh Circuit has rejected reliance on the "perceptions of [an] ill-informed" or "first-time visitor" when determining what the reasonable observer would conclude. *Chabad-Lubavitch of Ga.* v. *Miller*, 5 F.3d 1383, 1390 n.11 (11th Cir. 1993).

Both Justice Thomas and Justice Gorsuch have noted the significant disagreement between the circuits on this point. Then-Judge Gorsuch noted, in dissenting from denial of rehearing en banc in *Davenport*, that the Tenth Circuit had "*repeatedly* misapplied the 'reasonable observer' test" by equating the reasonable observer with a "biased, impaired, and distracted viewer," as a result "strik[ing] down laws other courts would uphold." 637 F.3d at 1107, 1110. Justice Thomas observed that it was "entirely unpredictable" whether "a given court's hypothetical observer will be '*any* beholder (no matter how unknowledgeable), or the *average* beholder, or * * * the 'ultra-reasonable' beholder." *Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 132 S. Ct. 12, 19-20 (2011) (Thomas, J., dissenting from denial of certiorari) (citation omitted).

3. The circuits disagree on the relevance of a monument's longevity and history.

Finally, the division between the circuits appears to rest on disagreement as to whether to accord any weight to the factor Justice Breyer deemed "determinative" in *Van Orden*—that is, that a display has stood for decades without facing legal challenge. 545 U.S. at 702.

The Ninth and Fourth Circuits have openly rejected this portion of Justice Breyer's controlling concurrence. In *Trunk*, the Ninth Circuit stated, shortly after citing Justice Breyer's statement to the contrary, that "the suggestion that the longevity and permanence of [a monument] diminishes its effect has *no traction*." 629 F.3d at 1122 (emphasis added); *see Carpenter* v. *City & Cty. of San Francisco*, 93 F.3d 627, 632 (9th Cir. 1996) (similar). Similarly, in the decision below, the panel cited the relevant portion of *Van Orden* and then immediately dismissed it as "too simplistic," contending instead that "the longer a violation persists, the *greater* the affront to those offended." App. 23a-24a (emphasis added).

Unsurprisingly, other circuits have not dismissed this Court's precedent so cavalierly. The Fifth Circuit has held that the fact that a display "stood without complaint" for decades "supports the notion that [it] was not objectively seen as predominantly religious." *Staley* v. *Harris Cty.*, 461 F.3d 504, 513 (5th Cir. 2006), *dismissed as moot*, 485 F.3d 305 (5th Cir. 2007) (en banc); *see Murray*, 947 F.2d at 158 (relying on the cross's "long and unchallenged use" in upholding its constitutionality). Similarly, the Eighth Circuit has upheld the constitutionality of a monument in part because "decades passed during

which the *** monument stood *** without objection." *ACLU Nebraska Found.* v. *City of Plattsmouth*, 419 F.3d 772, 778 (8th Cir. 2005).

* * *

In short, the circuits disagree on whether municipalities, States, and the Federal Government may maintain cross-shaped memorials, even memorials that are laden with secular details and that have stood without controversy for decades. And they disagree on *how* to determine whether those memorials are lawful in the first place. Only this Court's intervention can clear the confusion. The Fourth, Ninth, and Tenth Circuits have each refused to rehear the relevant decisions en banc, despite multiple vigorous dissents. *See Trunk*, 660 F.3d at 1091 (Bea, J., dissenting from denial of rehearing en banc); *Buono II*, 527 F.3d at 760 (O'Scannlain, J., dissenting from denial of rehearing en banc); *Davenport*, 637 F.3d at 1101 (Kelly, J., dissenting from denial of rehearing en banc); *id.* at 1107 (Gorsuch, J., dissenting from denial of rehearing en banc); App. 98a (Gregory, C.J., dissenting from denial of rehearing en banc); App. 99a (Wilkinson, J., dissenting from denial of rehearing en banc); App. 101a (Niemeyer, J., dissenting from denial of rehearing en banc). And this Court's decisions in *Van Orden* and *Buono* have not caused any of these courts to reassess its views. The Court should grant certiorari and hold that, at least where a monument is as plainly secular as the Peace Cross, and has stood without controversy for decades, the mere use of a cross does not render it unconstitutional.

III. THE QUESTION PRESENTED IS IMPORTANT.

The question presented is of exceptional importance. On its own, the Fourth Circuit's invalidation of the Peace Cross would merit this Court's review. The Peace Cross has stood as a place of solemn commemoration and a source of civic unity for nearly a century. By compelling its removal, destruction or dismemberment, the panel's decision will necessitate an act of shocking disrespect for the brave souls of Prince George's County who died fighting for their country in World War I. *Buono*, 559 U.S. at 715-716. It will also deprive the community of a historic landmark that has for generations enabled residents to remember lost loved ones, engage in expressions of patriotism, and honor the Nation's veterans. "The demolition of this venerable *** monument" will inevitably be "interpreted by some as an arresting symbol of a Government *** bent on eliminating from all public places and symbols any trace of our country's religious heritage," provoking the sort of religiously-based divisiveness the Establishment Clause seeks to prevent. *Id.* at 726; *see Van Orden*, 545 U.S. at 704 (Breyer, J., concurring).

Review is also warranted because the Fourth Circuit's decision "puts at risk hundreds of monuments with similar symbols standing on public grounds" throughout the region encompassed by the Fourth Circuit. App. 101a (Niemeyer, J., dissenting from denial of rehearing en banc). In Arlington National Cemetery, two large crosses "of comparable size"—the Argonne Cross and the Canadian Cross of Sacrifice—stand in commemoration of the veterans of

World War I. *Id.* In Towson, Maryland, the Wayside Monument honors 204 men from Baltimore County who died in World War I. D. Ct. Dkt. 83-63. In Virginia, the Cape Henry Memorial Cross records the place where the first English colonists landed.[4] Other such monuments are common in military graveyards, town centers, and national parks throughout the Fourth Circuit and the country more broadly. *See, e.g.*, *Trunk*, 660 F.3d at 1099-1100 (Bea, J., dissenting from denial of rehearing en banc) (listing hundreds of additional examples); *Buono II*, 527 F.3d at 765 n.6 (O'Scannlain, J., dissenting from denial of rehearing en banc) (giving further examples). It is difficult to see how these crosses could stand if the Peace Cross—which is marked in every conceivable way with declarations of its secular purpose—cannot.

The panel majority suggested that the monuments at Arlington National Cemetery might be distinguished from the Peace Cross because they are "smaller," appear in a "designated area for commemorating and memorializing veterans who have passed away," and are surrounded by graves carrying religious symbols. App. 29a & n.16. These distinctions are empty. The Argonne Cross and Canadian Cross of Sacrifice are between 13 and 24 feet high, substantially "talle[r]" than the surrounding monuments. App. 24a. Veterans Memorial Park is Prince George's County's place for "commemorating and memorializing veterans," no less than Arlington

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[4] *Cape Henry Memorial Cross*, Nat'l Park Serv., https://www.nps.gov/came/cape-henry-memorial-cross.htm (last visited June 28, 2018).

National Cemetery is the Nation's. And the notion that *more* religious symbolism would have saved the Cross from invalidity under the Establishment Clause is absurd. If anything, the addition of overtly sectarian monuments nearby would have indicated—contrary to fact—that the Peace Cross commemorates Christian veterans alone, sending precisely the sort of divisive message the Establishment Clause disfavors.

Finally, certiorari is warranted to bring much-needed clarity to this Court's Establishment Clause jurisprudence. *See Rowan Cty.* v. *Lund*, No. 17-565, 2018 WL 3148570, at *1 (U.S. June 28, 2018) (Thomas, J., joined by Gorsuch J., dissenting from denial of certiorari). Countless displays throughout the Nation employ crosses and other religious symbols. The circuits' profound disagreements about the proper means of evaluating these displays—whether crosses are inescapably religious, whether the reasonable observer is merely a casual passerby, and whether longstanding history matters at all—have resulted in variations that defy rational explanation. *See, e.g.*, *City of Eugene*, 93 F.3d at 620 (invalidating same war memorial previously upheld by another court); App. 24a-26a (considering factors expressly rejected by Third and Sixth Circuits); *Utah Highway Patrol*, 132 S. Ct. at 17-20 (Thomas, J., dissenting from denial of certiorari) (cataloguing other examples). The Court should not permit longstanding civic monuments in Bladensburg, Arlington, and elsewhere to be removed on the basis of such arbitrary distinctions and regional variations in approach.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JUNE 2018

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2597

AMERICAN HUMANIST ASSOCIATION; STEVEN LOWE; FRED EDWORDS; BISHOP MCNEILL,

Plaintiffs – Appellants,

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Defendant – Appellee,

THE AMERICAN LEGION; THE AMERICAN LEGION DEPARTMENT OF MARYLAND; THE AMERICAN LEGION COLMAR MANOR POST 131,

Intervenors / Defendants – Appellees,

FREEDOM FROM RELIGION FOUNDATION; CENTER FOR INQUIRY,

Amici Supporting Appellant,

THE BECKETT FUND FOR RELIGIOUS LIBERTY; JOE MANCHIN; DOUG COLLINS; VICKY

HARTZLER; JODY HICE; EVAN JENKINS; JIM JORDAN; MARK MEADOWS; ALEX MOONEY; STATE OF WEST VIRGINIA; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF HAWAII; STATE OF IDAHO; STATE OF INDIANA; STATE OF KANSAS; STATE OF KENTUCKY; STATE OF LOUISIANA; STATE OF MICHIGAN; STATE OF MONTANA; STATE OF NEVADA; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF RHODE ISLAND; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TEXAS; STATE OF UTAH; STATE OF VIRGINIA; STATE OF WISCONSIN,

Amici Supporting Appellee.

Appeal from the United States District Court of Maryland, at Greenbelt. Deborah K. Chasanow, Senior District Judge. (8:14-cv-00550-DKC)

ARGUED: December 7, 2016

Decided: October 18, 2017

OPINION

Before GREGORY, Chief Judge, and WYNN and THACKER, Circuit Judges.

Reversed and remanded by published opinion. Judge Thacker wrote the opinion, which Judge Wynn joined.

Chief Judge Gregory wrote an opinion concurring in part and dissenting in part.

ARGUED: Monica Lynn Miller, AMERICAN HUMANIST ASSOCIATION, Washington, D.C., for Appellants. Christopher John DiPompeo, JONES DAY, Washington, D.C.; William Charles Dickerson, MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, Riverdale, Maryland, for Appellees. **ON BRIEF:** David A. Niose, AMERICAN HUMANIST ASSOCIATION, Washington, D.C.; Daniel P. Doty, LAW OFFICE OF DANIEL P. DOTY, P.A., Baltimore, Maryland, for Appellants. Adrian R. Gardner, Tracey A. Harvin, Elizabeth L. Adams, MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, Riverdale, Maryland, for Appellee Maryland-National Capital Park and Planning Commission; Noel J. Francisco, JONES DAY, Washington, D.C.; Roger L. Byron, Kenneth A. Klukowski, FIRST LIBERTY, Plano, Texas, for Appellees The American Legion, The American Legion Department of Maryland, and The American Legion Colmar Manor Post 131. Patrick C. Elliott, FREEDOM FROM RELIGION FOUNDATION, Madison, Wisconsin, for Amici Freedom From Religion Foundation and Center For Inquiry. Eric C. Rassbach, THE BECKET FUND FOR RELIGIOUS LIBERTY, Washington, D.C.; Paul J. Zidlicky, SIDLEY AUSTIN LLP, Washington, D.C., for Amicus The Becket Fund for Religious Liberty. Charles J. Cooper, David H. Thompson, Howard C. Nielson, Jr., Haley N. Proctor, COOPER & KIRK, PLLC, Washington, D.C., for Amici Senator Joe Manchin and Representatives

Doug Collins, Vicky Hartzler, Jody Hice, Evan Jenkins, Jim Jordan, Mark Meadows, and Alex Mooney. Patrick Morrisey, Attorney General, Elbert Lin, Solicitor General, Julie Marie Blake, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Amicus State of West Virginia; Steve Marshall, Attorney General of Alabama, Montgomery, Alabama, for Amicus State of Alabama; Mark Brnovich, Attorney General of Arizona, Phoenix, Arizona, for Amicus State of Arizona; Leslie Rutledge, Attorney General of Arkansas, Little Rock, Arkansas, for Amicus State of Arkansas; Pamela Jo Bondi, Attorney General of Florida, Tallahassee, Florida, for Amicus State of Florida; Christopher M. Carr, Attorney General of Georgia, Atlanta, Georgia, for Amicus State of Georgia; Douglas S. Chin, Attorney General of Hawaii, Honolulu, Hawaii, for Amicus State of Hawaii; Lawrence G. Wasden, Attorney General of Idaho, Boise, Idaho, for Amicus State of Idaho; Curtis Hill, Attorney General of Indiana, Indianapolis, Indiana, for Amicus State of Indiana; Derek Schmidt, Attorney General of Kansas, Topeka, Kansas, for Amicus State of Kansas; Andy Beshear, Attorney General of Kentucky, Frankfort, Kentucky, for Amicus State of Kentucky; Jeff Landry, Attorney General of Louisiana, Baton Rouge, Louisiana, for Amicus State of Louisiana; Bill Schuette, Attorney General of Michigan, Lansing, Michigan, for Amicus State of Michigan; Timothy C. Fox, Attorney General of Montana, Helena, Montana, for Amicus State of Montana; Adam Paul Laxalt, Attorney General of Nevada, Carson City, Nevada, for Amicus State of Nevada; Wayne Stenehjem, Attorney General of North Dakota, Bismarck, North

Dakota, for Amicus State of North Dakota; Michael DeWine, Attorney General of Ohio, Columbus, Ohio, for Amicus State of Ohio; E. Scott Pruitt, Attorney General of Oklahoma, Oklahoma City, Oklahoma, for Amicus State of Oklahoma; Peter F. Kilmartin, Attorney General of Rhode Island, Providence, Rhode Island, for Amicus State of Rhode Island; Alan Wilson, Attorney General of South Carolina, Columbia, South Carolina, for Amicus State of South Carolina; Marty J. Jackley, Attorney General of South Dakota, Pierre, South Dakota, for Amicus State of South Dakota; Ken Paxton, Attorney General of Texas, Austin, Texas, for Amicus State of Texas; Sean D. Reyes, Attorney General of Utah, Salt Lake City, Utah, for Amicus State of Utah; Mark R. Herring, Attorney General of Virginia, Richmond, Virginia, for Amicus Commonwealth of Virginia; Brad D. Schimel, Attorney General of Wisconsin, Madison, Wisconsin, for Amicus State of Wisconsin.

THACKER, Circuit Judge:

In this case we are called upon to decide whether the Establishment Clause is violated when a local government displays and maintains on public property a 40-foot tall Latin cross, established in memory of soldiers who died in World War I. The district court determined that such government action does not run afoul of the Establishment Clause because the cross has a secular purpose, it neither advances nor inhibits religion, and it does not have the primary effect of endorsing religion.

We disagree. The monument here has the primary effect of endorsing religion and excessively entangles the government in religion. The Latin cross is the core symbol of Christianity. And here, it is 40 feet tall; prominently displayed in the center of one of the busiest intersections in Prince George's County, Maryland; and maintained with thousands of dollars in government funds. Therefore, we hold that the purported war memorial breaches the "wall of separation between Church and State." *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (internal quotation marks omitted). Accordingly, we reverse and remand.

I.

A.

In 1918, some Prince George's County citizens started raising money to construct a giant cross, in addition to a previously established plaque, to honor 49 World War I soldiers from the county. The private organizers required each donor to sign a pledge sheet recognizing the existence of one god. It stated:

> WE, THE CITIZENS OF MARYLAND, *TRUSTING IN GOD, THE SUPREME RULER* OF THE UNIVERSE, PLEDGE FAITH IN OUR BROTHERS WHO GAVE THEIR ALL IN THE WORLD WAR TO MAKE THE WORLD SAFE FOR DEMOCRACY. THEIR MORTAL BODIES HAVE TURNED TO DUST, BUT THEIR SPIRIT LIVES TO GUIDE US THROUGH LIFE IN THE WAY OF *GODLINESS*, JUSTICE, AND LIBERTY.

> WITH OUR MOTTO, "*ONE GOD*, ONE COUNTRY AND ONE FLAG," WE CONTRIBUTE TO THIS MEMORIAL CROSS COMMEMORATING THE MEMORY OF THOSE WHO HAVE NOT DIED IN VAIN.

J.A. 1168 (emphasis supplied).[1] Local media described the proposed monument as a "mammoth cross, a likeness of the Cross of Calvary, as described in the Bible."[2] *Id.* at 1115. The private organizers held a groundbreaking ceremony on September 28, 1919, at which time the city of Bladensburg owned the land.

In 1922, the private organizers ran out of money and could not finish the project. So, the Snyder-Farmer Post of the American Legion (the "Post") assumed responsibility. At its initial fundraising drive, the Post had a Christian prayer-led invocation. Later that same year, on Memorial Day, the Post held memorial services around the unfinished monument, at which a Christian chaplain led prayer, and those in attendance sang the Christian hymn "Nearer My God to Thee." J.A. 2096. The Post ultimately completed the monument in 1925 and had Christian prayer services at the dedication ceremony, during which only Christian chaplains took part. No other religions were represented.

Upon completion, the monument at issue stood four stories tall in the shape of a Latin cross located in

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[1] Citations to the "J.A." or "Supp. J.A." refer to the Joint Appendix and Supplemental Joint Appendix, respectively, filed by the parties in this appeal.

[2] "Calvary" refers to the "proper name of the place where [Jesus] Christ was crucified." J.A. 289.

the median of a three-way highway intersection in Bladensburg, Maryland (the "Cross"). Over the years, memorial services continued to occur on a regular basis at the Cross, and those services often included prayer at invocations and benedictions, and speaker-led prayers. Sunday worship services have at times been held at the Cross. Nothing in the record indicates that any of these services represented any faith other than Christianity.

On March 1, 1961, Appellee Maryland-National Capital Park and Planning Commission (the "Commission"), a state entity, obtained title to the Cross and the land on which it sits. According to the Commission, it acquired the Cross and land in part because of safety concerns arising from the placement of the Cross in the middle of a busy traffic median. Therefore, the Commission purports that it assumed responsibility to "maintain[], repair[], and otherwise car[e] for" the Cross. J.A. 2529. The Commission has since spent approximately $117,000 to maintain and repair the Cross, and in 2008, it set aside an additional $100,000 for renovations.

B.

Today, the 40-foot tall Cross is situated on a traffic island taking up one-third of an acre at the busy intersection of Maryland Route 450 and U.S. Route 1 in Bladensburg. The American Legion's symbol – a small star inscribed with "U.S." – is affixed near the top of the Cross, and an American flag flies in the vicinity of the Cross. The Cross sits on a rectangular base, with each side inscribed with one of four words: "valor," "endurance," "courage," and "devotion." J.A. 1963 (capitalization omitted). Additionally, one side of the base contains a two-foot tall, nine-foot wide

plaque listing the names of the 49 soldiers from Prince George's County whom the Cross memorializes, followed by a quote by President Woodrow Wilson.[3] However, the plaque is located on only one side of the base, which bushes have historically obscured.[4] Moreover, the plaque is badly weathered, rendering it largely illegible to passing motorists.

The Cross is part of a memorial park honoring veterans in Bladensburg (the "Veterans Memorial Park"). A small sign titled "Star-Spangled Banner National Historical Trail" is located on a walking path approximately 600 feet north of the Cross. This small sign – which, like the plaque at the base of the Cross, is not readily visible from the highway – serves as the only formal marker identifying the area as a memorial park by stating, "This crossroads has become a place for communities to commemorate their residents in service and in death." J.A. 1870. The other monuments in the memorial park area include a War of 1812 memorial, a World War II memorial, a Korean and Vietnam veterans memorial, and a September 11th memorial walkway. These surrounding monuments are each located at least 200 feet away from the Cross, with the War of 1812

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[3] "The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives." J.A. 1891.

[4] The bushes were removed in response to the filing of this action in an attempt to accommodate Appellants' requests. *See* Oral Argument at 26:50–27:00, *Am. Humanist Assoc. v. Maryland-Nat'l Capital Park & Planning Comm'n*, No. 15-2597, http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments (Dec. 7, 2016).

memorial located one-half mile away. No other monument in the area is taller than ten feet, and there are no other religious symbols in the park.

Beyond the above description of the Cross and its placement in the park, various photographs from the record depicting the Cross are attached to this opinion. *See* J.A. 34 (image of the Cross before this case was filed), 1098 (closer image of the Cross), 1891 (image of the weathered plaque at the base of the Cross); Supp. J.A. 2 (overhead image of the Veterans Memorial Park).

II.

Appellants Steven Lowe, Fred Edwords, and Bishop McNeill are non-Christian residents of Prince George's County who have faced multiple instances of unwelcome contact with the Cross. Specifically, as residents they have each regularly encountered the Cross while driving in the area, believe the display of the Cross amounts to governmental affiliation with Christianity, are offended by the prominent government display of the Cross, and wish to have no further contact with it. Per their complaint, they believe "a more fitting symbol of [veterans'] sacrifice would be a symbol of the Nation for which they fought and died, not a particular religion." J.A. 25. Appellant American Humanist Association ("AHA") is a nonprofit organization that advocates to uphold the founding principle of separation of church and state. AHA is suing on behalf of its members.[5]

As noted, Appellee Commission, a state entity, owns and maintains the Cross and the traffic island

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[5] Where appropriate, Appellants AHA, Lowe, Edwords, and McNeill are collectively referred to as "Appellants.

on which it stands. Appellees-Intervenors are the American Legion, the American Legion Department of Maryland, and the American Legion Colmar Manor Post 131 (collectively, "the Legion").[6] The Legion is a private organization focused on "Americanism" and the armed forces. J.A. 1469.

Appellants sued the Commission under 42 U.S.C. § 1983, alleging the Commission's display and maintenance of the Cross violates the Establishment Clause. Appellants seek a declaratory judgment that this conduct violates the Establishment Clause and Appellants' constitutional rights, an injunction enjoining the Commission from displaying the Cross on public property,[7] nominal damages, and attorney's fees and costs.

Appellants and Appellees filed cross-motions for summary judgment, and the district court granted summary judgment to Appellees. In doing so, the district court analyzed Appellants' claim pursuant to *Lemon v. Kurtzman*, 403 U.S. 602 (1971). It held the Commission owned the Cross and land for a legitimate secular reason, that is, to maintain the highway median. The district court also identified a second secular purpose, which is to commemorate the 49 World War I soldiers from Prince George's County.[8]

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[6] Where appropriate, the Commission and Legion are collectively referred to as "Appellees."

[7] Appellants later clarified their desired injunctive relief as removal or demolition of the Cross, or removal of the arms from the Cross "to form a non-religious slab or obelisk." J.A. 131.

[8] Alternatively, the district court applied *Van Orden v. Perry*, 545 U.S. 677 (2005), and reached the same conclusion.

The district court next determined that the Cross neither advanced nor inhibited religion because (1) the Cross has been primarily used for veterans' events; (2) crosses are generally regarded as commemorative symbols for World War I, at least overseas; (3) secular war memorials surround the Cross; and (4) the Cross has secular attributes, such as the Legion symbol on the face of the Cross. Finally, the district court concluded the Commission's display and maintenance of the Cross did not amount to excessive entanglement with religion because the Cross was not a governmental endorsement of religion. At bottom, the district court viewed the Commission's maintenance of the Cross as relating to traffic safety and veteran commemoration rather than religion. Appellants timely appealed.

III.

We review de novo a district court's grant of summary judgment. *See Elderberry of Weber City, LLC v. Living Centers-Se., Inc.*, 794 F.3d 406, 411 (4th Cir. 2015). "In doing so, we apply the same legal standards as the district court, and view all facts in the light most favorable to the nonmoving party." *Certain Underwriters at Lloyd's, London v. Cohen*, 785 F.3d 886, 889 (4th Cir. 2015) (alterations and internal quotation marks omitted).

IV.

Appellants contend that the Cross is a war memorial that favors Christians to the exclusion of all other religions. In response, Appellees frame Appellants' claim as promoting a strict rule that crosses on government property are per se unconstitutional, which they assert threatens memorials across the Nation.

A.

As an initial matter, Appellees question whether Appellants have standing to bring this claim. They argue that Appellants have not "forgone any legal rights," such as "the right to drive on the public highways running through [the] Veterans Memorial Park" "to avoid contact with the memorial." Appellees' Br. 46 n.12. Appellees' standing argument lacks merit.

An Establishment Clause claim is justiciable even when plaintiffs claim noneconomic or intangible injury. *See Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997); *see also Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 582 (4th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017). Specifically, in religious display cases, "unwelcome direct contact with a religious display that appears to be endorsed by the state" is a sufficient injury to satisfy the standing inquiry. *Suhre*, 131 F.3d at 1086.

The non-AHA Appellants have standing because they allege specific unwelcome direct contact with the Cross; that is, they have each regularly encountered the Cross as residents while driving in the area, the Commission caused such injury by displaying the Cross, and the relief sought – enjoining the display of the Cross -- would redress their injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *see also ACLU v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1108 (11th Cir. 1983) (determining one plaintiff had standing because a Latin cross was clearly visible from "the porch of his summer cabin" and from the roadway he used to reach the cabin). The AHA also has standing. An association has standing to sue on

behalf of its members if they would have standing to sue on their own, the association seeks to protect interests germane to its purpose, and neither the claim asserted nor the relief requested requires its individual members to participate in the lawsuit. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 429 (6th Cir. 2011). Here, the AHA has members in Prince George's County who have faced unwelcome contact with the Cross. These interests are germane to the AHA's purpose of maintaining the separation of church and state, and the claim and relief sought do not require individual participation. Appellants thus have standing to sue, and so we turn to the merits of this case.

B.

The Establishment Clause provides, "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. This clause thus guarantees religious liberty and equality to people of all faiths. *See Cty. of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989), *abrogated on other grounds*, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

We have generally analyzed Establishment Clause issues pursuant to *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Buxton v. Kurtinitis*, 862 F.3d 423, 432 (4th Cir. 2017); *Lambeth v. Bd. of Comm'rs of Davidson Cty.*, 407 F.3d 266, 268 (4th Cir. 2005); *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003). Per *Lemon*, to comply with the Establishment Clause, a challenged government display must (1) have a secular purpose; (2) not have a "principal or primary effect" that advances, inhibits, or endorses religion; and (3) not foster "an excessive

entanglement between government and religion." *Lambeth*, 407 F.3d at 269–73 (internal quotation marks omitted); *see Lemon*, 403 U.S. at 612–13. "If a state action violates even one of these three prongs, that state action is unconstitutional." *Koenick v. Felton*, 190 F.3d 259, 265 (4th Cir. 1999) (citing *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1147 (4th Cir. 1991)); *see also Buxton*, 862 F.3d at 432.

However, Appellees dispute *Lemon*'s application here, arguing that, instead, the Supreme Court's holding in *Van Orden v. Perry*, 545 U.S. 677 (2005), controls. In *Van Orden*, the Court addressed whether a monument displaying the Ten Commandments on government property violated the Establishment Clause. *See* 545 U.S. at 681. The monument, located between the Texas Capitol and the Texas Supreme Court building, also displayed an eagle grasping the American flag, two Stars of David, Greek letters representing Christ, and an inscription indicating that a private organization donated the monument. *See id.* at 681–82. The monument stood six-feet high and three-and-a-half feet wide, and sat among "17 monuments and 21 historical markers commemorating the people, ideals, and events that compose Texan identity," *id.* at 681 (internal quotation marks omitted), such as monuments of the Heroes of the Alamo, the Texas National Guard, and the Texas Peace Officers, *see id.* at 681 n.1.

A plurality of the Court first decided the *Lemon* test is "not useful" in the "passive" monument context. *Van Orden*, 545 U.S. at 686. Rather, it examined the role and historical meanings of God and the Ten Commandments in our Nation's history.

See id. at 686–91. The plurality first noted President George Washington's Thanksgiving Day Proclamation of 1789, which "directly attributed to the Supreme Being the foundations and successes of our young Nation," as an example of the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Id.* at 686–87 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)). It also recognized "the role of God in our Nation's heritage," pointing to other Ten Commandment displays in federal buildings, including the Supreme Court's own courtroom and the Library of Congress, which reinforced the secular connection between our Nation and the Ten Commandments. *See id.* at 687–89. Though the Ten Commandments have religious significance, the plurality noted that the Ten Commandments were given to Moses, who "was a lawgiver as well as a religious leader." *Id.* at 690. Finally, the plurality viewed the placement of the monument on the Texas State Capitol grounds as "far more passive" when compared to other display cases, especially because the petitioner in *Van Orden* "walked by the monument for a number of years" before suing. *Id.* at 691. Taking all of these considerations as a whole, the plurality concluded that the display in *Van Orden* did not violate the Establishment Clause.

Justice Breyer's concurrence, however, is controlling because it is the narrowest ground upholding the majority. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 236 (4th Cir. 2002); *see also Card v. City of Everett*, 520 F.3d 1009, 1017 n.10

(9th Cir. 2008) (noting Justice Breyer's concurrence controls); *Staley v. Harris Co.*, 485 F.3d 305, 308 n.1 (5th Cir. 2007) (same); *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 49 (2d Cir. 2011) (same); *ACLU v. Grayson Co.*, 591 F.3d 837, 847 (6th Cir. 2010) (applying *Van Orden* and relying primarily on Justice Breyer's concurrence). The concurrence explains that courts should remain faithful to the "basic purposes" of the Establishment Clause by examining, for example, the circumstances surrounding the monument's placement, its physical setting, and the length of time it remains unchallenged. *Van Orden*, 545 U.S. at 698, 700–03 (Breyer, J., concurring). In addition, however, Justice Breyer clarified that the *Lemon* test continues to act as a "useful guidepost[]" in Establishment Clause cases involving monuments with both secular and sectarian meanings. *Id.* at 700. The controlling *Van Orden* decision thus did not overrule *Lemon*; to the contrary, Justice Breyer actually recognized *Lemon* as a "more formal Establishment Clause test[]." *Id.* at 703. And this court has consistently applied *Lemon* in religious display cases. *See, e.g.*, *Lambeth*, 507 F.3d at 268–69; *Smith v. Cty. of Albemarle*, 895 F.2d 953, 958 (4th Cir. 1990). Thus, we see fit to apply *Lemon* in this case, with due consideration given to the *Van Orden* factors.

C.

For their part, Appellees assert *Van Orden* "dictates the outcome of this case," and there is no Establishment Clause violation because (1) the Commission's involvement relates to highway safety; (2) memorials surrounding the Cross commemorate veterans; and (3) the Cross has stood unchallenged

for 90 years. Appellees' Br. 21. But even under *Lemon*, Appellees contend that they prevail, particularly because the Cross's "content, setting, and history make clear to a reasonable objective observer that its primary effect is commemoration, not religious endorsement." *Id.* at 22. Therefore, Appellees argue that they prevail regardless of whether *Van Orden* or *Lemon* applies.

In support of their argument to the contrary, Appellants primarily rely on *Lemon*'s second prong – that is, the "effect of advancing religion." Appellants highlight the Latin cross's inherent religious message, the history of religious activity involving the Cross, the Cross's size and prominence, and its limited secular features. Appellants alternatively assert that the Cross is unconstitutional under *Van Orden* because the Latin cross lacks any connection to our Nation's history, and the Cross's physical setting undermines the Establishment Clause.

As explained above, we analyze this case pursuant to the three-prong test in *Lemon* with due consideration given to the factors outlined in *Van Orden*, mindful that a violation of even one prong of *Lemon* results in a violation of the Establishment Clause.

1.

Secular Purpose

Demonstrating a legitimate secular purpose is "a fairly low hurdle." *Brown v. Gilmore*, 258 F.3d 265, 276 (4th Cir. 2001) (internal quotation marks omitted). Moreover, government action having "dual legitimate purposes" – one secular and one sectarian

– "cannot run afoul of the first *Lemon* prong." *Id.* at 277.

The Commission has articulated legitimate secular purposes for displaying and maintaining the Cross that satisfy the first prong of *Lemon*. *See Lynch*, 465 U.S. at 680–81. The Commission obtained the Cross for a secular reason – maintenance of safety near a busy highway intersection. The Commission also preserves the memorial to honor World War I soldiers. Government preservation of a significant war memorial is a legitimate secular purpose. *See Trunk v. City of San Diego*, 629 F.3d 1099, 1108 (9th Cir. 2011). Thus, the Commission has satisfied the first prong of *Lemon*.

2.

Effect

The second prong of *Lemon* requires this court to ask "whether a particular display, with religious content, would cause a reasonable observer to fairly understand it in its particular setting as impermissibly advancing or endorsing religion." *Lambeth*, 407 F.3d at 271. A "reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious speech takes place." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (alterations omitted) (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring)). "Put differently, the effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval of religion." *Mellen*, 327 F.3d at 374 (alterations and internal quotation marks omitted).

This second prong therefore requires a detailed factual analysis of the Cross, including its meaning, history, and secularizing elements, and, where relevant, we consider the appropriate factors under *Van Orden*. *See Trunk*, 629 F.3d at 1110.

a.

Meaning of the Latin Cross

The Latin cross is the "preeminent symbol of Christianity." *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004) (internal quotation marks omitted); *see Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995); *Gonzales v. N. Twp. of Lake Cty.*, 4 F.3d 1412, 1418 (7th Cir. 1993); *Murray v. City of Austin*, 947 F.2d 147, 149 (5th Cir. 1991); *ACLU v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110 (11th Cir. 1983). Indeed, the Latin cross is "exclusively a Christian symbol, and not a symbol of any other religion." *Trunk*, 629 F.3d at 1111 (internal quotation marks omitted); *see Buono*, 371 F.3d at 545; *Gonzales*, 4 F.3d at 1418 ("[W]e are masters of the obvious, and we know that the crucifix is a Christian symbol."). Notwithstanding the Latin cross's inherent religious meaning, the district court concluded that it is also a symbol of World War I, particularly overseas. Specifically, the district court concluded that the Cross at issue here evokes the image of white crosses on foreign battle fields. For this proposition, it cites the Legion's expert witness report, which states that "the symbolism of the cross is that of individual loss of life, not of the Resurrection [of Jesus Christ]." J.A. 1898.

While the Latin cross may generally serve as a symbol of death and memorialization, it only holds value as a symbol of death and resurrection *because*

of its affiliation with the crucifixion of Jesus Christ. *See Carpenter v. City and Cty. of San Francisco*, 93 F.3d 627, 630 (9th Cir. 1996) ("The Latin cross is the preeminent symbol of many Christian religions and represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity" (internal quotation marks omitted)); *ACLU v. City of St. Charles*, 794 F.2d 265, 273 (7th Cir. 1986) ("It is the principal symbol of the Christian religion, recalling the crucifixion of Jesus Christ and the redeeming benefits of his passion and death" (internal quotation marks omitted)). One simply cannot ignore the fact that for thousands of years the Latin cross has represented Christianity. Even in the memorial context, a Latin cross serves not simply as a generic symbol of death, but rather a Christian symbol of the death of Jesus Christ.[9] Further, even if other countries may identify the Latin cross as a commemorative symbol of World War I, that acknowledgment does not dictate our analysis. Indeed, crosses used on World War I battlefields were *individual* – rather than universal – memorials to the lives of Christian soldiers.[10] And

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[9] The argument could be made that to hold that the Latin cross symbolizes anything other than Christianity may be deemed offensive to Christians. The Latin cross "reminds Christians of Christ's sacrifice for His people," and "it is unequivocally a symbol of the Christian faith." *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1022 (10th Cir. 2008).

[10] The poppy has actually been known as a universal symbol for commemorating World War I. *See Trunk*, 629 F.3d at 1113; Eang L. Ngov, *Selling Land and Religion*, 61 U. Kan. L. Rev. 1, 28 (2012) ("The poppy, as depicted in the famous poem In Flanders Fields, not the cross, became the universal symbol in

this Nation, unlike others, maintains a clearly defined wall between church and state that "must be kept high and impregnable." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). Thus, the manner in which other countries view the Latin cross is of no moment.

Further, a Latin cross differs from other religious monuments, such as the Ten Commandments or the motto "In God We Trust." Those symbols are well known as being tied to our Nation's history and government, and courts have thus upheld their public display. *See, e.g.*, *Van Orden*, 545 U.S. at 688 (noting the secular role of the Ten Commandments in American history); *Lambeth*, 407 F.3d at 271–72 (acknowledging the ties between American history and the motto "In God We Trust"). Appellees have not sufficiently demonstrated that the Latin cross has a similar connection.

b.

History of the Cross

Though the history of the Latin cross favors Appellants, the history of the particular Cross before us does not clearly support one party over the other.

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the United States and abroad for the foreign wars" (footnotes omitted)); *The Cambridge Encyclopedia* 877 (6th ed. 2006) ("Red poppies, which grew wild in the fields of Flanders, are used in November as a symbol of remembrance of those who died in the two World Wars"); *see generally* H.R. Rep. No. 80-2071 (discussing the use of the poppy to memorialize World War I and reporting favorably on commemorative stamps depicting the poppy); Ryan Valentin, *Milk and Other Intoxicating Choices: Official State Symbol Adoption*, 41 N. Ky. L. Rev. 1, 5–6 (2014); Jennifer Iles, *In Remembrance: The Flanders Poppy*, 13 Mortality 201 (2008) (discussing the history of the poppy and its status as a symbol of remembrance).

On the one hand, the initial donors to the memorial fund signed a pledge professing a belief in God, and the Cross has been the scene of Christian activities, such as Sunday worship services and group prayer at invocations and benedictions. On the other hand, private organizations raised money to erect the Cross, it has a scattered history of religious use, and it has primarily hosted veteran-focused ceremonies. Thus, when viewed through the lens of not only *Lemon*, but also of *Van Orden*, the circumstances surrounding the Cross's placement admittedly point to a semisecular history. *See Van Orden*, 545 U.S. at 701.

It is also true that the Cross has stood unchallenged for 90 years, which Appellees argue reinforces its secular effect. *See Van Orden*, 545 U.S. at 702. But that argument is too simplistic. In this case, it cannot be said that "the longer the violation, the less violative it becomes." *Gonzales*, 4 F.3d at 1422 (rejecting the argument that nearly 40 years without challenging a crucifix reinforced its secular effect).[11] Perhaps the longer a violation persists, the

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[11] Of note, a person who dared bring a challenge to the Cross for much of those 90 years would have faced possible rebuke. For example, atheists were forbidden from holding public office until the Supreme Court's intervention in the 1960's. In 1959, the Governor of Maryland appointed Roy Torcaso as a Notary Public, but the Secretary of State of Maryland refused to issue the commission because Torcaso, an atheist, would not declare a belief in the existence of god. *See* Appellant's Br. 4; *Torcaso v. Watkins*, 367 U.S. 488 (1961). The Maryland Constitution provides, "No religious test ought to be required as a qualification for any office of profit or trust in this state other than a declaration of belief in the existence of God." The Supreme Court deemed the clause unconstitutional declaring that Maryland had "set[] up a religious test which was designed to and, if valid, does bar every person who refuses to declare a

greater the affront to those offended. The Cross's history therefore does not definitively aid either side in the analysis.

c.

Secular Elements

Admittedly, the Cross contains a few secular elements. As support for their position, Appellees point to the plaque at the base of the Cross that contains the names of the 49 soldiers from Prince George's County whose lives were lost in World War I; the Legion symbol; the words "valor," "endurance," "courage," and "devotion" inscribed on its base; an American flag flying in its vicinity; and its location in the Veterans Memorial Park. Appellees maintain that the plaque and symbols diminish any government endorsement of religion.

But the sectarian elements easily overwhelm the secular ones. The Cross is by far the most prominent monument in the area, conspicuously displayed at a busy intersection, standing four stories tall, and overshadowing the other monuments, the tallest of which is only ten feet tall and located approximately 200 feet from the Cross. The other monuments composing the Veterans Memorial Park are anywhere from 200 feet away to a half-mile away. The immense size and prominence of the Cross necessarily "evokes a message of aggrandizement and universalization of religion, and not the message of individual memorialization and remembrance that

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belief in God from a public office of profit or trust in Maryland." *Torcaso*, 367 U.S. at 489 (internal quotation marks omitted). More than 50 years later, the constitution still contains the offending provision. *See* Md. Const. Decl. of Rts. art. 37.

is presented by a field of gravestones." *Trunk*, 629 F.3d at 1116 n.18 (citation omitted).

In addition, the Cross is not located in an area where one could easily park, walk to the Cross, and examine the plaque.[12] Rather, the Cross is located in a high-traffic area, and passers-by would likely be unable to read the plaque, particularly given its location on only one side of the Cross,[13] and the fact that both the plaque and the American Legion symbol are badly weathered, not to mention that the American Legion symbol is small in comparison to the overall size of the Cross. We also cannot ignore the American Legion's affiliation with Christianity, as gleaned from its prayer manuals and the "Four Pillars of the American Legion." J.A. 1469.[14] And,

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[12] Although there may be parking available in the vicinity of the Cross, as well as a walkway to the Cross, realistically, the general public may not easily or readily access the Cross. In fact, Appellees admitted at oral argument that pedestrians attending ceremonies held at the Cross accessed the site primarily with help from police officers guiding pedestrians through the intersection and highway. *See* Oral Argument at 25:00–26:30, *Am. Humanist Assoc. v. Maryland-Nat'l Capital Park & Planning Comm'n*, No. 15-2597, http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments (Dec. 7, 2016). And, after all, the primary reason the Commission took over the maintenance of the Cross was for safety reasons, given its location in the middle of a busy highway intersection.

[13] The plaque's location on one side of the Cross makes it visible, if at all, only to those traveling on a small portion of the busy highway. *See* J.A. 1891 (photograph of the weathered plaque); *see also* Appendix (attached).

[14] For example, to the exclusion of other religions, each Legion chapter has a chaplain, and the Legion has a Christian prayer manual that is used at meetings, invocations, and benedictions.

when we consider the physical setting of the Cross pursuant to *Van Orden*, Appellees' arguments are equally unavailing. *See* 545 U.S. at 702. The Cross's location on public property at a busy traffic intersection, the small size and scattered locations of the surrounding monuments, plus the fact that bushes have obscured the plaque for much of its history, *see, e.g.*, J.A. 34 (photograph of the Cross before this case was filed), all point to a violative display. *See Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1121 (10th Cir. 2010) ("The fact that the [12-foot tall] cross includes biographical information about [a] fallen trooper does not diminish the governmental message endorsing Christianity. This is especially true because a motorist driving by one of the memorial crosses at 55-plus miles per hour may not notice, and certainly would not focus on, the biographical information.").

Thus, we conclude that the historical meaning and physical setting of the Cross overshadows its secular elements. Other courts presented with similar situations have concluded likewise. *See, e.g.*, *Trunk*, 629 F.3d at 1123 (concluding a 43-foot Latin cross, though purporting to serve as a war memorial, overshadowed its secular aspects, which included a plaque and 2,100 commemorative bricks); *Gonzales*, 4 F.3d at 1422–23 (determining that an 18-foot wooden crucifix advanced religion, despite containing a plaque dedicating it to veterans, because the

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Further, pursuant to the "Four Pillars of the American Legion," the Legion opposes attacks on "patriotic" values. J.A. 1469. Such attacks include prayer being "removed from schools," "[r]eferences to God [being] challenged," and attacks on the "institution of marriage." *Id.* at 1469–70.

plaque was obscured); *Smith*, 895 F.2d at 958 (concluding a crèche [15] on government property violated the Establishment Clause in part because a plaque stating its private sponsorship was "relatively small . . . in relation to the whole" display, thus "mitigat[ing] [the plaque's] value").

According to the dissent, our analysis bases the unconstitutionality of the Cross "predominantly on the size of the cross," without fairly weighing its "appearance, context, and factual background." *Post* at 42 (emphasis omitted). This is not accurate. Although we are of the opinion that the size of a religious display does matter, we have also carefully considered the other factors required by *Lemon* and *Van Orden*. *See* Part IV.C.2.a (analyzing context and meaning); Part IV.C.2.b (factual background and history); Part IV.C.2.c (appearance). We are confident that we have fully complied with our "constitutional directive." *Post* at 42.

d.

Reasonable Observer

Considering the factors above, we conclude that a reasonable observer would fairly understand the Cross to have the primary effect of endorsing religion. We do not disagree with the dissent's characterization of the "reasonable observer" as someone who is not just an "ordinary individual" but "aware of the history and context of the community and forum in which the religious display appears."

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[15] A crèche is "a visual representation of the scene in the manger in Bethlehem shortly after the birth of Jesus, as described in the Gospels of Luke and Matthew." *Cty. of Allegheny*, 492 U.S. at 580 (footnote omitted).

Post at 43–44 (internal quotation marks omitted); *see Lambeth*, 407 F.3d at 271–72 (quoting *Good News Club*, 533 U.S. at 119 (citation omitted)). In fact, Appellees at oral argument reaffirmed that the reasonable observer is aware of the entire context and history of the Cross, spanning from its origin to the present. *See* Oral Argument at 18:04–19:00, *Am. Humanist Assoc. v. Maryland-Nat'l Capital Park & Planning Comm'n*, No. 15-2597, http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments (Dec. 7, 2016).

Accordingly, a reasonable observer would know that the Cross is dedicated to 49 World War I veterans and that veteran services occur at the Cross. But, more importantly, a reasonable observer would also know that the private organizers pledged devotion to faith in God, and that same observer knows that Christian-only religious activities have taken place at the Cross. No party has come forward with any evidence to the contrary. Although the reasonable observer may recognize that the Cross is located in the Veterans Memorial Park, such reasonable observer also could not help but note that the Cross is the most prominent monument in the Park and the only one displaying a religious symbol. Further, the reasonable observer would know that a Latin cross generally represents Christianity. These factors collectively weigh in favor of concluding that the Cross endorses Christianity – not only above all other faiths, but also to their exclusion.

The Commission and supporting amici equate the Cross to the crosses in Arlington National Cemetery and similar locations. They raise concerns that

siding with Appellants here would jeopardize other memorials across the Nation displaying crosses, laying waste to such memorials nationwide. Any such concern is misplaced. Establishment Clause cases are fact-specific, and our decision is confined to the unique facts at hand. *See McCreary Cty. v. ACLU*, 545 U.S. 844, 867–68 (2005) (recognizing the relevant inquiry is based on the specific facts before the Court); *Van Orden*, 545 U.S. at 700 (acknowledging the "fact-intensive" nature of religious display cases); *Card*, 520 F.3d at 1014; *Staley*, 485 F.3d at 309; *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222 (10th Cir. 2005).

In any event, Arlington National Cemetery is a designated area for commemorating and memorializing veterans who have passed away.[16] The crosses there are much smaller than the 40-foot tall monolith at issue here. And, significantly, Arlington National Cemetery displays diverse religious symbols, both as monuments and on individual headstones.[17] Contrast that with the Cross here. There are no other religious symbols present on the Cross or in the entirety of the Veterans Memorial Park. Christianity is singularly – and overwhelmingly – represented. Therefore, the second prong of *Lemon* is violated.

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[16] It must be made clear that we are not deciding or passing judgment on the constitutionality of Arlington National Cemetery's display of Latin crosses. Rather, we are merely distinguishing the facts at hand from those displayed at other places of commemoration.

[17] Images of such headstones are attached in the appendix.

3.

Excessive Entanglement

We turn now to the third prong of the *Lemon* test – whether the government display creates "an excessive entanglement between government and religion." *Lambeth*, 407 F.3d at 272–73 (internal quotation marks omitted). Excessive entanglement with religion "is a question of kind and degree." *Lynch*, 465 U.S. at 684. Such entanglement may include "pervasive monitoring or other maintenance by public authorities." *Lambeth*, 407 F.3d at 273 (citations omitted). Spending public funds, though a factor in the analysis, is not necessary for a plaintiff to satisfy the entanglement prong. *See Constangy*, 947 F.2d at 1152. Indeed, excessive entanglement may lie simply where the government's entanglement has the effect of advancing or inhibiting religion. *See Agostini v. Felton*, 521 U.S. 203, 232–33 (1997).

We hold there is excessive religious entanglement in this case for two reasons. First, the Commission owns and maintains the Cross, which is displayed on government property. The Commission has spent at least $117,000 to maintain the Cross and has set aside an additional $100,000 for restoration. Other cases holding that displays violate the Establishment Clause have involved de minimis government spending, if any. *See Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring) ("[A]ny use of public funds to promote religious doctrines violates the Establishment Clause." (emphasis omitted)).[18]

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[18] The dissent's view to the contrary is only based on its differing views of the Cross – as a "historical monument" rather than promotion of a religious doctrine in the form of a religious

Second, displaying the Cross, particularly given its size, history, and context, amounts to excessive entanglement because the Commission is displaying the hallmark symbol of Christianity in a manner that dominates its surroundings and not only overwhelms all other monuments at the park, but also excludes all other religious tenets. The display aggrandizes the Latin cross in a manner that says to any reasonable observer that the Commission either places Christianity above other faiths, views being American and Christian as one in the same, or both. Therefore, the third prong of *Lemon* is also violated. We note, however, that because the Cross is unconstitutional under the effect prong, the excessive entanglement prong here merely provides an alternative indicator of the Cross's unconstitutionality.

4.

Conclusion

The Commission's display of the Cross fails the second and third prongs of *Lemon*, and the *Van Orden* factors are unsupportive of Appellees' position in this case. The display and maintenance of the Cross violates the Establishment Clause.

V.

For the foregoing reasons, the judgment of the district court is

REVERSED AND REMANDED.[19]

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symbol. *Post* at 48. For the reasons explained *supra*, the Cross embodies promotion of a religious doctrine, Christianity, and therefore, Justice O'Connor's statement is directly applicable.

[19] Upon remand, the parties should note that this opinion does not presuppose any particular result (i.e., removing the

APPENDIX

(J.A. 34)[20]

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arms or razing the Cross entirely); rather, the parties are free to explore alternative arrangements that would not offend the Constitution.

[20] A photograph of the Cross prior to the filing of this case.

(J.A. 1098)[21]

[21] A photograph of the Cross from 2014 prior to the filing of this case.

(J.A.1891)[22]

(Supp. J.A. 2)[23]

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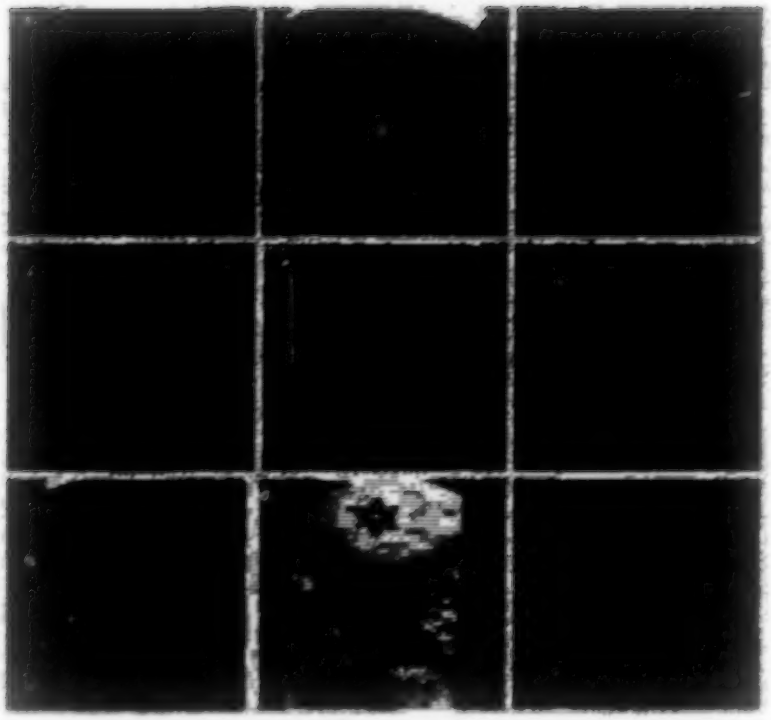
[22] A photograph of the weathered plaque located on the base of the Cross.

[23] An overhead image of the Veterans Memorial Park. The Cross is located slightly to the left of center, titled "WWI Memorial."



As referenced in footnote 17, images of headstones in Arlington National Cemetery adorned with diverse religious symbols, identified from top left to bottom right: Soka Gakkai, Christianity, Buddhism, Wicca, Islam, Catholicism, United Church of Christ, Judaism, and Atheism. Arlington National Cemetery, https://pbs.twimg.com/media/CUa2t63VEAEoIfE.jpg.

GREGORY, Chief Judge, concurring in part and dissenting in part:

I agree with the majority's holding that Appellants have standing under 42 U.S.C. § 1983 to bring this action for a violation of the Establishment Clause. But I disagree with the majority's ultimate conclusion that the display and maintenance of the war memorial in this case violates the Establishment Clause. I therefore respectfully dissent in part.

I.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. To properly understand and apply the Establishment Clause, it must be viewed "in the light of its history and the evils it was designed forever to suppress." *Everson v. Bd. of Educ.*, 330 U.S. 1, 14–15 (1947). The early colonization of America was a time marked with religious persecution. Immigrating settlers fled religious suppression in Europe only to be met with similar treatment in America. "[M]en and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated." *Id.* at 10. Those regarded as nonconformists were required "to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters." *Id.*

The Establishment Clause was intended to combat the practice of "compel[ling individuals] to support and attend government favored churches." *Id.* at 8;

accord Myers v. Loudoun Cty. Pub. Sch., 418 F.3d 395, 402 (4th Cir. 2005). The Clause's historical setting reveals that "[i]ts first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). The realization of its goal meant that the government must "'neither engage in nor compel religious practices,' that it must 'effect no favoritism among sects or between religion and nonreligion,' and that it must 'work deterrence of no religious belief.'" *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (plurality opinion) (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

But the Clause does not require the government "to purge from the public sphere" any reference to religion. *Id.* at 699. "Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id.* (citations omitted). While neutrality may be the "touchstone" of the Establishment Clause, it more so serves as a "sense of direction" than a determinative test. *McCreary Cty. v. Am. Civil Liberties Union*, 454 U.S. 844 (2005). We cannot view neutrality as some sort of "brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring). Thus, in reviewing the challenged war memorial, this Court must seek general rather than absolute neutrality. We do so by engaging in the three-factor analysis delineated in *Lemon v. Kurtzman* (the "*Lemon* test"), which requires that

the memorial have a secular purpose; have a principal or primary effect that neither advances, inhibits, nor endorses religion; and not foster "an excessive government entanglement with religion." 403 U.S. 602, 612–13 (1971). The memorial "must satisfy each of the *Lemon* test's three criteria" to pass constitutional muster. *Lambeth v. Bd. of Comm'rs of Davidson Cty.*, 407 F.3d 266, 269 (4th Cir. 2005) (citing *Mellen v. Bunting*, 327 F.3d 355, 367 (4th Cir. 2003)).

II.

A.

I will briefly reiterate the operative facts. In Bladensburg, Maryland, in a median at the intersection of Maryland Route 450 and U.S. Route 1, stands a war memorial consisting of a forty-foot-tall concrete Latin cross (the "Memorial"). The Memorial and the median are currently owned by Appellee Maryland-National Capital Park and Planning Commission (the "Commission"). Intervenor-Appellee American Legion's symbol is displayed in the middle of the cross on both faces. The cross sits on a base and includes a plaque that lists the names of the forty-nine Prince George's County residents who died in World War I. J.A. 1891. The plaque also states, "THIS MEMORIAL CROSS DEDICATED TO THE HEROES OF PRINCE GEORGE'S COUNTY MARYLAND WHO LOST THEIR LIVES IN THE GREAT WAR FOR THE LIBERTY OF THE WORLD," and includes a quotation from President Woodrow Wilson. *Id.* Also, each face of the base is inscribed with one of four words: "VALOR," "ENDURANCE," "COURAGE," and "DEVOTION." J.A. 1963.

In 1918, a group of private citizens led the charge to construct and finance the Memorial. The donors signed a pledge stating that they, "trusting in God, the Supreme Ruler of the universe," pledged their faith in the forty-nine war dead, whose spirits guided them "through life in the way of godliness, justice, and liberty." J.A. 1168. The group also circulated a fundraising flyer stating,

> Here, those who come to the Nation's Capital to view the wonders of its architecture and the sacred places where their laws are made and administered may, before this Cross, rededicate[] themselves to the principles of their fathers and renew the fires of patriotism and loyalty to the nation which prompted these young men to rally to the defense of the right. And here the friends and loved ones of those who were in the great conflict will pass daily over a highway memorializing their boys who made the supreme sacrifice.

J.A. 2303.

A groundbreaking ceremony was held for the Memorial and for Maryland Route 450 (then known as the National Defense Highway) in late 1919. Several local officials spoke about the fallen soldiers and how both the Memorial and highway would commemorate their bravery and sacrifice. But the private group ultimately failed to raise enough money to construct the Memorial and abandoned the project. The local post of the American Legion, a congressionally chartered veterans service organization, then took up the task and completed the Memorial on July 25, 1925. That day, the post held a ceremony which included multiple speeches regarding the Memorial's representation of the men

who died fighting for this country and an invocation and benediction delivered by local clergymen.

Over time, additional monuments honoring veterans were built near the Memorial (known as the "Veterans Memorial Park"). Because the Memorial sits in the middle of a median and is separated by a busy highway intersection, the closest additional monument is about 200 feet away. Since the Memorial's completion, numerous events have been hosted there to celebrate Memorial Day, Veterans Day, the Fourth of July, and the remembrance of September 11th. These ceremonies usually include an invocation and benediction, but the record demonstrates that only three Sunday religious services were held at the Memorial—all of which occurred in August 1931. J.A. 347.

Due to increasing traffic on the highway surrounding it, the Commission acquired the Memorial and the median where it is located from the American Legion in March 1961. Since that time, the Commission has spent approximately $117,000 to maintain and repair the Memorial. In 2008, it set aside an additional $100,000 for renovations, of which only $5,000 has been spent as of 2015. J.A. 562–65. On February 25, 2014, more than fifty years after the Memorial passed into state ownership, Appellants initiated this suit against the Commission under 42 U.S.C. § 1983 alleging a violation of the Establishment Clause.

B.

By concluding that the Memorial violates the Establishment Clause, the majority employed the *Lemon* test "with due consideration given to the factors outlined in *Van Orden*." Maj. Op. at 16. In *Van Orden*, a plurality of the Supreme Court determined that the *Lemon* test was not useful when evaluating a "passive monument." 545 U.S. at 686. Instead, the Court's analysis was "driven both by the nature of the monument and by our Nation's history." *Id.* As the majority recognizes, Justice Breyer's concurrence is the controlling opinion in *Van Orden*. Maj. Op. at 14. Justice Breyer states that the Court's Establishment Clause tests, such as *Lemon*, cannot readily explain the Clause's tolerance of religious activities in "borderline cases," as there is "no single mechanical formula that can accurately draw the constitutional line in every case." *Van Orden*, 454 U.S. at 699–700 (Breyer, J., concurring). "If the relation between government and religion is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases." *Id.* at 700. Instead of applying *Lemon* to the challenged Ten Commandments display, Justice Breyer exercised his "legal judgment" and evaluated the context of the display and how the undeniably religious text of the Commandments was used. *Id.* at 700–04. His concurrence, however, also noted that *Lemon* provides a "useful guidepost[]—and might well lead to the same result"—for "no exact formula can dictate a resolution to such fact-intensive cases." *Id.* at 700.

Relying on *Lemon*, and drawing guidance from *Van Orden*, the majority determined that the Commission

articulated a legitimate secular purpose for displaying the Memorial. Nevertheless, the majority concluded that the Memorial failed *Lemon*'s second and third factors, finding that a reasonable observer would conclude that the Memorial has the primary effect of endorsing religion and the Commission's maintenance of the Memorial constitutes excessive entanglement with religion. In my view, the majority misapplies *Lemon* and *Van Orden* to the extent that it subordinates the Memorial's secular history and elements while focusing on the obvious religious nature of Latin crosses themselves; constructs a reasonable observer who ignores certain elements of the Memorial and reaches unreasonable conclusions; and confuses maintenance of a highway median and monument in a state park with excessive religious entanglement.

III.

Because Appellants do not challenge the district court's finding that the Commission has demonstrated a secular purpose for displaying and maintaining the Memorial (the first *Lemon* factor), I will discuss in turn the majority's evaluation of the second and third *Lemon* factors—whether the Memorial has the primary effect of advancing or inhibiting religion and whether the government is excessively entangled with religion.

A.

Under *Lemon*'s second factor, we must determine "whether a particular display, with religious content, would cause a reasonable observer to fairly understand it in its particular setting as impermissibly advancing or endorsing religion." *Lambeth*, 407 F.3d at 271. This reasonable observer

inquiry "requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the [display] and its placement." *Salazar v. Buono*, 559 U.S. 700, 721 (2010) (plurality opinion). We should not ask "whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think the State endorses religion." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) (internal quotation marks omitted). Instead, we must determine "whether . . . the display's principal or primary effect is to advance or inhibit religion; or, put differently, whether an informed, reasonable observer would view the display as an endorsement of religion." *Lambeth*, 407 F.3d at 272.

It is undeniable that the Latin cross is the "preeminent symbol of Christianity." Maj. Op. at 18. But we must be careful not to "focus exclusively on the religious component" of a display, as that "would inevitably lead to its invalidation under the Establishment Clause." *Lambeth*, 407 F.3d at 271 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)). Indeed, the Supreme Court "has consistently concluded that displays with religious content—but also with a legitimate secular use—may be permissible under the Establishment Clause." *Id.* (citing *Cty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 579 (1989)). A reasonable observer would be aware that the cross is "not merely a reaffirmation of Christian beliefs," for it is "often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure

an honored place in history for this Nation and its people." *Buono*, 559 U.S. at 721.

Despite the religious nature of the Latin cross, a reasonable observer must also adequately consider the Memorial's physical setting, history, and usage. The Memorial was created to commemorate the forty-nine soldiers who lost their lives in World War I, as explicitly stated on the plaque attached to its base. *See* J.A. 1891 ("THIS MEMORIAL CROSS DEDICATED TO THE HEROES OF PRINCE GEORGE'S COUNTY MARYLAND WHO LOST THEIR LIVES IN THE GREAT WAR FOR THE LIBERTY OF THE WORLD."). The plaque also includes a quotation from President Woodrow Wilson stating, "The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives." *Id.* Each face of the cross includes the American Legion seal and each face of the base is inscribed with one of four words: "VALOR," "ENDURANCE," "COURAGE," and "DEVOTION." J.A. 1963. The Memorial has functioned as a war memorial for its entire history, and it sits among other secular monuments in Veterans Memorial Park, though it is separated from the other monuments by intersecting highways.

The majority concludes that the size of the Latin cross making up the Memorial overwhelms these secular elements. In the majority's view, the Memorial is unconstitutional based predominantly on the size of the cross, and neither its secular features nor history could overcome the presumption. But such a conclusion is contrary to our constitutional directive. We must fairly weigh the

appearance, context, *and* factual background of the challenged display when deciding the constitutional question. *See Lynch*, 465 U.S. at 679–80; *Cty. of Allegheny*, 492 U.S. at 598–600. Although a reasonable observer would properly notice the Memorial's large size, she would also take into account the plaque, the American Legion symbol, the four-word inscription, its ninety-year history as a war memorial, and its presence within a vast state park dedicated to veterans of other wars. Would the majority's version of a reasonable observer be satisfied and better equipped to evaluate the Memorial's history and context if the cross were smaller? Perhaps if it were the same size as the other monuments in the park? Though Establishment Clause cases require a fact-intensive analysis, we must bear in mind our responsibility to provide the government and public with notice of actions that violate the Constitution. What guiding principle can be gleaned from the majority's focus on the cross's size? Understandably, the majority's decision would lead to per se findings that all large crosses are unconstitutional despite any amount of secular history and context, in contravention of Establishment Clause jurisprudence.

The majority also makes much of the Memorial's isolation from the other monuments in Veterans Memorial Park, as it sits in the median of a now busy highway, making it difficult to access. But a reasonable observer would note that the Memorial was placed there as part of the concurrent creation of the National Defense Highway to commemorate the soldiers of World War I, not as a means of endorsing religion. And, though Veterans Memorial Park does

not include any other religious symbols as memorials, there is no evidence that the state formally foreclosed the possibility of erecting any other religious symbol. Also, the reasonable observer would note that the Memorial's physical setting does not lend itself to any religious worship. *Van Orden*, 545 U.S. at 702 (stating that religious display's location in large park containing other monuments suggested "little or nothing sacred," as it illustrated residents' historical ideals and "did not readily lend itself to meditation or any other religious activity").

Additionally, due to the Memorial's location, the majority explains that a reasonable observer would not be able to easily examine the Memorial's secular elements. Maj. Op. at 23. This is because the Memorial "is located in a high-traffic area and passers-by would likely be unable to read the plaque," which is small and badly weathered. *Id.* at 23. However, the reasonable observer's knowledge is not "limited to the information gleaned simply from viewing the challenged display." *Pinette*, 515 U.S. at 780–81 (O'Connor, J., concurring). That the average person in the community may have difficulty viewing all of the secular elements of the Memorial while stuck in traffic or driving at high speeds is of no consequence, for the reasonable observer "is not to be identified with any ordinary individual, . . . but is rather a personification of a community ideal of reasonable behavior" who is "deemed aware of the history and context of the community and forum in which the religious display appears." *Id.* at 779–80 (internal quotation marks and citations omitted). Thus, the reasonable observer's ability to consider these secular elements is by no means diminished.

Further, quoting *Trunk v. City of San Diego*, 629 F.3d 1099, 1116 n.18 (9th Cir. 2011), the majority states that the large size and isolation of the Memorial "evokes a message of aggrandizement and universalization of religion, and not the message of individual memorialization and remembrance that is presented by a field of gravestones." Maj. Op. at 22. In *Trunk*, the Ninth Circuit considered a forty-three-foot free-standing cross and veterans memorial erected in a state park. 629 F.3d at 1101. The court evaluated the history of the Latin cross generally, its use as a war memorial, the history of the particular war memorial at issue, and its physical setting. *Id.* at 1102–05, 1110–24. The cross in *Trunk* had no secular elements; instead, it was unadorned and without any physical indication that it was a war memorial until after litigation was initiated to remove it. *Id.* at 1101–02; *see also Smith v. Cty. of Albemarle*, 895 F.2d 953, 958 (4th Cir. 1990) (concluding that crèche, unassociated with any secular symbols, prominently displayed in front of government building, and unaccompanied by any other religious or nonreligious displays, conveyed message of governmental endorsement of religion). The court concluded that a reasonable observer would perceive the presence of the cross as the federal government's endorsement of Christianity, due in part to its long history of serving as a site of religious observance, with no indication of any secular purpose for almost three decades. *Id.* at 1125.

But here, the Memorial has always served as a war memorial, has been adorned with secular elements for its entire history, and sits among other memorials in Veterans Memorial Park. The

Memorial's predominant use has been for Veterans Day and Memorial Day celebrations, although three religious services were conducted at the Memorial nearly ninety years ago. Also, the invocations and benedictions performed at the annual veterans celebrations are not enough to cause a reasonable observer to perceive the Memorial as an endorsement of Christianity in light of its overwhelmingly secular history and context. Further, guidance from *Van Orden* provides that the Memorial's ninety-year existence and fifty-year government ownership without litigation is a strong indication that the reasonable observer perceived its secular message. *See* 545 U.S. at 702–03 (stating that challenged monument's presence on government property for forty years provided determinative factor that it conveyed predominately secular message). The Memorial stands at a busy intersection, yet this case is the first time the Memorial has been challenged as unconstitutional. Those fifty years strongly suggest "that few individuals, whatever their system of beliefs, are likely to have understood the [Memorial] as amounting, in any significantly detrimental way, to a government effort . . . primarily to promote religion over nonreligion," or to "engage in," "compel," or deter any religious practice or beliefs. *Id.* at 702 (quoting *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring)); *see also Buono*, 559 U.S. at 716 ("Time also has played its role. [After] nearly seven decades[,] . . . the cross and the cause it commemorated had become entwined in the public consciousness."). This significant passage of time must factor into the Court's analysis and "help[] us understand that as a practical matter of *degree* [the

Memorial] is unlikely to prove divisive." *Van Orden*, 545 U.S. at 702.

With the foregoing facts, circumstances, and principles in mind, I conclude that a reasonable observer would understand that the Memorial, while displaying a religious symbol, is a war memorial built to celebrate the forty-nine Prince George's County residents who gave their lives in battle. Such an observer would not understand the effect of the Commission's display of the Memorial—with such a commemorative past and set among other memorials in a large state park—to be a divisive message promoting Christianity over any other religion or nonreligion. A cross near a busy intersection "need not be taken as a statement of governmental support for sectarian beliefs. The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society. Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework." *Buono*, 559 U.S. at 718–19 (citations omitted). We must be careful not to push the Establishment Clause beyond its purpose in search of complete neutrality. "[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands," but of extreme commitment to the secular, "or even active, hostility to the religious." *Van Orden*, 545 U.S. at 699 (quoting *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring)). Finding that a reasonable observer would perceive the Memorial as an endorsement of Christianity would require that we pursue a level of

neutrality beyond our constitutional mandate. I therefore conclude that the Memorial does not violate the second factor of the *Lemon* test.

B.

The Lemon test's final factor asks whether the challenged display has created an "excessive entanglement" between government and religion. *Lambeth*, 407 F.3d at 272–73. "The kind of excessive entanglement of government and religion precluded by Lemon is characterized by 'comprehensive, discriminating, and continuing state surveillance.'" *Id.* at 273 (quoting *Lemon*, 403 U.S. at 619). This inquiry is one of "kind and degree," *Lynch*, 465 U.S. at 684, "and because some interaction between church and state is inevitable, the Supreme Court has reaffirmed that the '[e]ntanglement must be "excessive" before it runs afoul of the Establishment Clause,'" *Koenick v. Felton*, 190 F.3d 259, 268 (4th Cir. 1999) (quoting *Agostini v. Felton*, 521 U.S. 203, 233 (1997)).

The majority concludes that the Memorial fosters excessive entanglement because of the Commission's ownership and maintenance of the Memorial. But the Commission's maintenance of the Memorial and the land surrounding it could hardly be considered the sort of state surveillance that *Lemon* intends to prohibit. *See Lemon*, 403 U.S. at 615–20 (concluding that challenged action excessively entangled state with religion by requiring state to supplement salaries for teachers in parochial schools); *see also Mellen*, 327 F.3d at 375 (determining that public university's supper prayer violated Lemon's third prong because school officials "composed, mandated, and monitored a daily prayer"). Rather, the

Commission is merely maintaining a monument within a state park and a median in between intersecting highways that must be well lit for public safety reasons. There is no evidence that the Commission consults with any churches or religious organizations to determine who may access the Memorial for events. Nor is there evidence that the Commission is required to be involved in any church-related activities to maintain the Memorial.

Further, the majority observes that "any use of public funds to promote religious doctrines violates the Establishment Clause." *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring). But, in *Agostini*, the Supreme Court held that a federally funded program that paid public school teachers to teach disadvantaged children in parochial schools did not cause an *excessive* entanglement between church and state. 521 U.S. at 234–35. Likewise, the Commission's use of $122,000 over the course of fifty-plus years for lighting and upkeep is not a promotion of any religious doctrine, as the Memorial is a historical monument honoring veterans.

I therefore conclude that the Memorial does not violate the third factor of the *Lemon* test.

* * *

This Memorial stands in witness to the VALOR, ENDURANCE, COURAGE, and DEVOTION of the forty-nine residents of Prince George's County, Maryland "who lost their lives in the Great War for the liberty of the world." I cannot agree that a monument so conceived and dedicated and that bears such witness violates the letter or spirit of the very

Constitution these heroes died to defend. Accordingly, I would affirm the district court's judgment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. DKC 14-0550

AMERICAN HUMANIST ASSOCIATION, et al.

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Filed: November 30, 2015

MEMORANDUM OPINION

Presently pending and ready for resolution in this Establishment Clause case is a motion for summary judgment filed by Plaintiffs American Humanist Association, Steven Lowe, Fred Edwords, and Bishop McNeill. (ECF No. 80).[1] Also pending are cross-motions for summary judgment filed by Defendant Maryland-National Capital Park and Planning Commission (the "Commission") (ECF No. 86) and

[1] Plaintiffs' initial motion for summary judgment (ECF No. 78) contained a separate statement of undisputed facts that was outside the length limitations found in Local Rule 105.3, as amended by court order. Plaintiffs' corrected motion for summary judgment is the operative motion. (ECF No. 80).

Intervenor-Defendants American Legion, The American Legion Department of Maryland, and The American Legion Colmar Manor Post 131. (the "American Legion") (ECF No. 83).[2] Finally, three motions for leave to file memoranda as *amici curie* are pending. (ECF Nos. 94; 95; 96). The relevant issues have been fully briefed, and the court now rules, no hearing being deemed necessary. Local Rule 105.6. For the following reasons, Plaintiffs' motion for summary judgment will be denied and Defendants' motions for summary judgment will be granted. The motions for leave to file as *amici curie* will be denied.

I. Background

A. Factual Background[3]

Standing at the intersection of Maryland Route 450 and U.S. Route 1 in Bladensburg, Maryland, is a memorial monument consisting, in part, of a large concrete Latin cross that is approximately forty feet tall. (ECF No. 83-6). Plaintiffs denoted the memorial as "The Bladensburg Cross" in the complaint, but acknowledge that it is also referred to as the "Peace Cross." Other references in the record use the name "Memorial Cross." Defendants use the term "Bladensburg Memorial" or some variation. In this opinion, except when referring to the name used in

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[2] Because the American Legion filed its motion for summary judgment only to assist the Commission in its defense, the two motions will be considered together. *See Hewett v. City of King*, 29 F.Supp.3d 584, 598 (M.D.N.C. 2014). Accordingly, the Commission and the American Legion will be collectively referred to as the "Defendants."

[3] Unless otherwise noted, the following facts are undisputed.

an historical reference, the term "Monument" will be used. The Monument and the median are currently owned by the Commission. (ECF Nos. 83-44; 83-45). The symbol of the American Legion is displayed in the middle of both faces of the cross. (ECF No. 83-2). The cross sits on a rectangular base, and the West face of the base contains a plaque listing the names of forty-nine men from Prince George's County who died in World War I. The plaque also reads: "This Memorial Cross Dedicated to the heroes of Prince George's County Maryland who lost their lives in the Great War for the liberty of the world," and includes a quotation from President Woodrow Wilson. Four words are inscribed directly above the base, on the bottom of the cross itself, one on each face: "valor; endurance; courage; devotion." An American flag flies on one side of the cross.

1. Creation of the Monument

The initial effort to construct and finance the Monument began in late 1918 and early 1919, led by a group of private citizens organized as the Prince George's County Memorial Committee (the "Memorial Committee"). (ECF Nos. 83-4, at 2; 83-10, at 4; 83-14; 83-25, at 2; 83-36, at 3). The fundraising effort garnered significant publicity at the time, including reports highlighting the link between the Monument and the National Defense Highway. (ECF No. 83-31). These early organizers circulated fundraising pledge sheets that read:

> We, the citizens of Maryland, trusting in God, the supreme ruler of the universe, pledge faith in our brothers who gave their all in the World War to make the world safe for democracy. Their mortal bodies have turned to dust, but their spirit lives to

> guide us through life in the way of godliness, justice, and liberty.
>
> With our motto, "one god, one country and one flag," we contribute to this memorial cross commemorating the memory of those who have not died in vain.

(ECF No. 80-32, at 3). The Memorial Committee circulated a fundraising flyer announcing the upcoming creation of the Monument and the National Defense Highway (now Maryland Route 450), which runs from Bladensburg to Annapolis. (ECF No. 83-25, at 2). The flyer noted that the "Memorial Cross will stand in a strategic position at the point where the Washington-Baltimore Boulevard joins the Defense Highway leading from Washington to Annapolis." (*Id.* at 3). The flyer also explained that:

> those who come to the Nation's Capital to view the wonders of its architecture and the sacred places where their laws are made and administered may, before this Cross, rededicate[] themselves to the principles of their fathers and renew the fires of patriotism and loyalty to the nation which prompted these young men to rally to the defense of the right. And here the friends and loved ones of those who were in the great conflict will pass daily over a highway memorializing their boys who made the supreme sacrifice.

(*Id.*).

A groundbreaking ceremony was held for the Monument and the National Defense Highway on September 28, 1919. (ECF No. 83-4, at 4). At the time of the groundbreaking, the land was owned by

the Town of Bladensburg (the "Town"). (ECF Nos. 83-6, at 10; 83-37; 90, at 17; 92, at 10). Families of the veterans participated in the ceremony, and Josephus Daniels, then-Secretary of the Navy, was the primary speaker. (ECF Nos. 83-9, at 5; 83-10, at 15). Secretary Daniels addressed both the Monument and the National Defense Highway: "A concrete highway . . . that will never fail in rain or sun, that every day in the year will present an unalterable face to every duty expected of it, as did the men in whose honor it was named; and a cross that will stand for time and eternity, like the principles they defended." (*Id.*). According to records from the Prince George's County Historical Society Library, "The Marine Band provided music, several speeches were given by local officials and the exercises were concluded by the singing of The Star Spangled Banner." (ECF No. 83-10, at 15 (internal quotation marks omitted)).

The Memorial Committee continued its fundraising efforts, but ultimately failed to raise enough money and abandoned their efforts in 1922. (*Id.* at 16). Because construction on the Monument had begun but was unfinished, the local post of the American Legion (the "Snyder-Farmer Post") assumed responsibility for completing the Monument. (ECF Nos. 83-12, at 26-27; 83-36, at 4-5). The parties dispute if the Town officially transferred the land to the Snyder-Farmer Post.[4] (*See* ECF Nos. 83-1, at 30;

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[4] The legal ownership of the land from 1922 until 1956 is disputed, but this fact is not material to the outcome of this case. The record indicates that the Snyder-Farmer Post had control over the land from 1922 until 1956, and a government entity controlled the land at all other times.

90, at 17). In 1922, the Town passed a resolution that:

> authorize[d] the Snyder-Farmer Post of the American Legion to complete said Cross and its surroundings in such manner as the Post may deem advisable; and, to this end, the Town Commissioners of Bladensburg, Maryland do hereby assign and grant to the said Snyder-Farmer Post #3, American Legion, that parcel of ground upon which the cross now stands and that part necessary to complete the park around said cross, to the perpetual care of Snyder-Farmer Post #3 as long as it is in existence, and should the said Post go out of existence the plot to revert to the Town of Bladensburg, together with the cross and its surroundings.

(ECF No. 83-37). Counsel for the Snyder-Farmer Post contended that this resolution was recorded in the land records of Prince George's County on April 30, 1935. (*See* ECF No. 83-45, at 2). Subsequent historical accounts appear to note either that the Town did in fact officially convey the land to the American Legion post *(see, e.g.*, ECF Nos. 80-24, at 2; 80-33, at 4; 83-4, at 3; 83-10, at 16) or express uncertainty about the ownership history of the land (*see* ECF No. 92-2, at 2).

The Snyder-Farmer Post succeeded in raising the funds required to complete the Monument. (ECF No. 83-4, at 4). The Snyder-Farmer Post held a dedication ceremony for the Monument on July 12, 1925. (ECF Nos. 83-4, at 4; 83-39). According to a contemporaneous news account, Representative Stephen Gambrill of Maryland's Fifth Congressional

District delivered the keynote address, stating, in part:

> Where we of the past generation have failed to prevent war, perhaps you young men of the American Legion or the mothers who gave their sons to the conflict may succeed.

And

> You men of Prince George's county fought for the sacred right of all to live in peace and security and by the token of this cross, symbolic of Calvary, let us keep fresh the memory of our boys who died for a righteous cause.

(ECF No. 83-39). The Army Music School band provided music for the dedication, local officials and figures delivered remarks, and local clergy offered an invocation and benediction. (ECF Nos. 80-28).

2. Subsequent Control and Use of the Monument and Veterans Memorial Park

In 1935, due to increased traffic on the roads surrounding the Monument, the Maryland state legislature "authorized and directed" the State Roads Commission "to investigate the ownership and possessory rights" of the area surrounding the Monument and to acquire the land "by purchase or condemnation." (ECF No. 83-40, at 2). Plaintiffs contend that the tract of land in question was *adjacent* to the Monument, but did not include the Monument itself - they maintain that the Monument has always been owned by a government entity. (ECF No. 90, at 19). Defendants assert that the Snyder-Farmer Post owned the Monument and the land on which it sat. (ECF Nos. 83-1, at 31-32; 92, at 10). The record is not entirely clear as to exactly

what land was transferred and when. Ultimately, the State Roads Commission obtained title to the tract mentioned in the state statute and conveyed it to the Commission by deed in 1960. (ECF No. 83-44). On March 1, 1961, to resolve any ambiguities, the Snyder-Farmer Post "transfer[ed] and assign[ed] to [the Commission] all its right, title and interest in and to the Peace Cross, also originally known as the Memorial Cross, and the tract upon which it is located and surrounded and bounded by the curbings and boundary lines of the highways of the State Roads commission adjoining the said Cross parcel." (ECF No. 83-45, at 4). The Commission "assume[d] the obligation of maintaining, repairing and otherwise caring for" the Monument, but the Snyder-Farmer Post reserved "the right and the privilege to hold memorial services to departed veterans and other ceremonies upon the parcel on appropriate dates and occasions." (*Id.* at 5). The Commission continues to own the Monument and the land on which it sits. (*See* ECF No. 83-13, at 6).

The Monument now sits amidst additional monuments as part of Veterans Memorial Park. (ECF No. 83-8, at 2). The National Park Service placed among the memorials a "Star-Spangled Banner National Historic Trail Marker" highlighting the Monument and the other monuments in the park. (ECF No. 86-11). In 1944, local American Legion posts dedicated a World War II memorial across the street from the Monument honoring the men and women of Prince George's County who died in that war. (ECF No. 83-9, at 7). Nearby, a plaque and tree commemorate the lives lost at Pearl Harbor. Following a joint public-private effort, a memorial to

veterans of Korea and Vietnam was dedicated on July 4, 1983. (*Id.* at 8). In 2006, an arcing stone walkway bordered by a granite ledge and a garden was built in the park to remember lives lost on September 11th. (ECF Nos. 83-1, at 5; 86, at 7-8). In 2010, the Town and the Anacostia Trails Heritage Area, Inc. convened a task force to explore ideas for monuments and events to commemorate the 200th anniversary of the War of 1812 and the Battle of Bladensburg. (ECF No. 86-25, at 4). Currently, there is a War of 1812 memorial just north of the Monument, and the Commission is in the process of installing two thirty-eight-foot-tall statues of soldiers representing the British Army and the defending American forces of the Battle of Bladensburg. (*Id.*). Finally, Veterans Memorial Park includes a flag display of the American flag, the Maryland flag, and the Prince George's County flag. (ECF No. 83-2, at 14).

Numerous events and gatherings have been held at the Monument and Veterans Memorial Park, the vast majority in commemoration of Memorial Day or Veterans Day. An invocation and benediction are often included. (ECF Nos. 80-41; 83-1, at 35-36; 83-9, at 6; 83-11, at 9-11). Local posts of the American Legion have hosted many of the Memorial Day and Veterans Day programs at the Monument and in the surrounding park, which often feature local government officials and representatives of other veterans' organizations. (ECF No. 83-11, at 9-11). The Town, through organizations such as the Bladensburg Patriotic Committee and the Bladensburg Promotional Committee, also has held events in conjunction with Memorial Day, Veterans

Day, the Fourth of July, and in remembrance of September 11th at the Monument or in the surrounding park. (ECF Nos. 80-7, at 7-8; 83-11, at 12). The events generally follow the same format and include a presentation of colors, the national anthem, an invocation, a keynote speaker (typically a veteran, military, local government, or American Legion official), songs or readings, the laying of a wreath or flowers, a benediction, and a reception. (*See, e.g.*, ECF Nos. 80-51; 83-68). Local American Legion posts, the Town, the Commission, and other government entities have also hosted rededications and other patriotic ceremonies at the Monument. (*See, e.g.*, ECF Nos. 80-50; 83-53). Although Defendants and the American Legion contend that no religious services have been held at the Monument, Plaintiffs point to a *Washington Post* column indicating that there were at least three Sunday religious services held at the Monument in 1931.[5] (ECF No. 80-41, at 6).

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[5]Plaintiffs provide evidence supporting their assertion that some religious services were held at the Monument. On the other hand, their allegations regarding the involvement of the Ku Klux Klan with the Monument are not supported by the record. Plaintiffs point to news reports regarding Klan events in Prince George's County held in the 1920s, but only one of these reports, a community calendar entry in *The Washington Post*, mentions the Monument, noting that "Robed klansmen will direct persons desiring to attend from the peace cross at Bladensburg to the fiery cross at Lanham." (ECF No. 80-45, at 5). The rally was not held at the Monument and there is no indication that the Monument was an official meeting point. Plaintiffs' suggestion of some connection is simply wrong. (*See* ECF No. 92, at 22 n.7).

While the Monument was built with private donations, the Commission has devoted resources over the years to maintain and illuminate it. Bladensburg Rotarians funded the installation of lights to illuminate the cross in 1965. (ECF No. 80-47). The Commission funds routine maintenance and lighting of the Monument (ECF No. 80-11, at 13) and has spent at least $117,000 on the Monument, including $100,000 on significant renovations in 1985. (ECF Nos. 80-1, at 24; 80-50, at 8). In 2008, the Commission budgeted an additional $100,000 for further repairs to the Monument that has not yet been entirely spent. (ECF No. 80-11, at 8).[6]

B. Procedural History

Plaintiffs commenced this action under 42 U.S.C. § 1983 on February 25, 2014, contending that the ownership, maintenance, and prominent display of the Monument on public property violates the Establishment Clause of the First Amendment of the United States Constitution, as applied to Maryland by the Fourteenth Amendment. They seek a declaratory judgment, an injunction, nominal damages, attorneys' fees, and costs. (ECF No. 1).[7] Defendant Commission filed an answer on April 28, 2014. (ECF No. 12). Intervenor-Defendants American Legion, et al. filed a motion to intervene (ECF No. 14), which was granted on September 18, 2014 (ECF Nos. 46; 47). On May 5, 2015, Plaintiffs

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[6] After this case was filed, the National Park Service placed the Monument on the National Register of Historic Places. (ECF No. 97-2).

[7] The specific injunctive relief sought in the Motion for Summary Judgment includes removal of the Monument, its demolition, or removal of the arms. (ECF No. 80, at 2).

filed the pending corrected motion for summary judgment. (ECF No. 80). On June 10, 2015, Intervenor-Defendants filed the pending cross-motion for summary judgment and response in opposition to Plaintiffs' motion. (ECF No. 83). One day later, the Commission filed the pending cross-motion for summary judgment and response in opposition to Plaintiffs' motion. (ECF No. 86). Plaintiffs filed a response in opposition to Defendants' motions (ECF No. 90), and Defendant-Intervenors replied (ECF No. 92).

On April 25, 2014, prospective *amici curiae* moved for leave to appear jointly as amicus curiae in support of Defendants and to file an amicus curiae memorandum. (ECF No. 11). By memorandum opinion and order issued on September 18, 2014, the undersigned granted in part the motion to appear jointly as amicus curiae and for leave to file an amicus curiae memorandum. (ECF Nos. 46; 47). The proposed *amici curiae* were permitted to participate as amicus curiae. The court noted, however, because no dispositive motions had yet been filed, the proposed memorandum submitted by the *amici curiae* would not be considered at that time. On September 15, 2015, the same prospective *amici curiae* filed an unopposed second motion for leave to file a memorandum in support of Defendants together with their memorandum. (ECF No. 94). On October 1, 2015, the Center for Inquiry filed a motion for leave to appear as amicus curiae in support of Plaintiffs and to file an amicus curiae memorandum. (ECF Nos. 95). Intervenor-Defendants do not oppose this motion, but the Center for Inquiry did not receive a response from Defendants. Also on October

1, 2015, the Council on American-Islamic Relations ("CAIR") filed a motion for leave to appear as amicus curiae in support of Plaintiffs and to file an amicus curiae memorandum. (ECF No. 96). CAIR attempted to obtain consent from Defendants and Intervenor-Defendants, but had not received a response by the time of filing.

II. Standard of Review

A court may enter summary judgment only if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008). Summary judgment is inappropriate if any material factual issue "may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *JKC Holding Co. LLC v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001).

"A party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of [his] pleadings,' but rather must 'set forth specific facts showing that there is a genuine issue for trial.' " *Bouchat v. Balt. Ravens Football Club, Inc.*, 346 F.3d 514, 522 (4th Cir. 2003) (quoting former Fed.R.Civ.P. 56(e)). "A mere scintilla of proof . . . will not suffice to prevent summary judgment." *Peters v. Jenney*, 327 F.3d 307, 314 (4th Cir. 2003). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249–50 (citations omitted). At the same time, the court must construe the facts that are presented in the light most favorable to the party opposing the motion.

Scott v. Harris, 550 U.S. 372, 378 (2007); *Emmett*, 532 F.3d at 297.

"When cross-motions for summary judgment are before a court, the court examines each motion separately, employing the familiar standard under Rule 56 of the Federal Rules of Civil Procedure." *Desmond v. PNGI Charles Town Gaming, LLC*, 630 F.3d 351, 354 (4th Cir. 2011). The court must deny both motions if it finds there is a genuine dispute of material fact, "[b]ut if there is no genuine issue and one or the other party is entitled to prevail as a matter of law, the court will render judgment." 10A Charles A. Wright, et al., *Federal Practice & Procedure* § 2720 (3d ed. 1998).

III. Analysis

A. Establishment Clause Jurisprudence and Framework

The First Amendment provides that "Congress shall make no law respecting an establishment of religion," U.S. Const. amend. I, and the Supreme Court of the United States has applied this principle against the states and their subdivisions through the Fourteenth Amendment. *See Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599, 608 (4th Cir. 2012) (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)). Despite the straightforward simplicity of the clause, "[t]here is 'no single mechanical formula that can accurately draw the constitutional line' " in every Establishment Clause case. *Myers v. Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 402 (4th Cir. 2005) (quoting *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring)). Indeed, Establishment Clause

jurisprudence is a law professor's dream, and a trial judge's nightmare. In the words of Justice Clarence Thomas, "Establishment Clause jurisprudence [is] in shambles." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S.Ct. 12, 13 (2011) (Thomas, J., dissenting from the denial of certiorari.)

Courts, including the United States Court of Appeals for the Fourth Circuit, often use the three-part test articulated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to assess alleged violations of the Establishment Clause. *See, e.g., Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227, 238 (2d Cir. 2014); *Moss*, 683 F.3d at 608; *Glassman v. Arlington Cnty.*, 628 F.3d 140, 146 (4th Cir. 2010) (determining *Lemon* to be the "appropriate test"); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1117 (10th Cir. 2010) (noting that "the touchstone for Establishment Clause analysis remains the tripartite test set out in Lemon") (citations and internal quotation marks omitted); *Hewett v. City of King*, 29 F.Supp.3d 584, 611 (M.D.N.C. 2014)(deciding the case "[u]nder the *Lemon* framework"). Most recently, the Fourth Circuit has articulated the *Lemon* test as requiring that, to pass constitutional muster, "government conduct (1) must be driven in part by a *secular purpose*; (2) must have a *primary effect* that neither advances nor inhibits religion; and (3) must not *excessively entangle* church and State." *Moss*, 683 F.3d at 608 (emphases in original) (citing *Lemon*, 403 U.S. at 612–13).

In 2005, a plurality of the Supreme Court recognized that, although commonly used, the *Lemon* test has not been uniformly applied to Establishment Clause cases. *Van Orden*, 545 U.S. at 684–86

(plurality opinion). In determining the constitutionality of a display of the Ten Commandments outside the Texas State Capitol, the plurality noted that the *Lemon* test "is not useful in dealing with [such] passive monument[s]." *Id.* at 686. Instead the plurality's "analysis [was] driven both by the nature of the monument and by our Nation's history." *Id.* Justice Breyer, in a controlling opinion concurring in the judgment, *see Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (recognizing that "Justice Breyer's concurrence provides the controlling opinion"); *Myers*, 418 F.3d at 402 (treating Justice Breyer's opinion as controlling), noted that in "borderline cases" there is "no test-related substitute for the exercise of legal judgment." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring). Such judgment "must reflect and remain faithful to the underlying purposes of the [Establishment and Free Exercise] Clauses, and it must take account of context and consequences measured in light of those purposes." *Id.*

Not surprisingly, the parties disagree whether *Lemon* or *Van Orden* controls this case. (ECF Nos. 83-1, at 38; 90, at 36; 92 at 16). Courts deciding Establishment Clause cases post-*Van Orden* also disagree. The Fourth Circuit, immediately after *Van Orden*, applied Justice Breyer's "legal judgment" test from *Van Orden* to the exclusion of the *Lemon* test, in upholding a statute providing for daily, voluntary recitation of the Pledge of Allegiance in Virginia's public schools. *Myers*, 418 F.3d at 402. *Myers* is, however, the only Fourth Circuit case to cite to *Van Orden*. In recent years, the Fourth Circuit has continued to apply the *Lemon* test with no mention of

Van Orden. *Moss*, 683 F.3d at 608; *Glassman*, 628 F.3d at 146; *see also Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1030 n.14 (10th Cir. 2008) ("Supreme Court Justices have harshly criticized Lemon. . . . Nevertheless, the *Lemon* test clings to life because the Supreme Court, in the series of splintered Establishment Clause cases since *Lemon* has never explicitly overruled the case."). Other courts have applied some hybrid form of the two tests. *See Salazar v. Buono*, 559 U.S. 700 (2010) (plurality opinion); *Trunk*, 629 F.3d at 1107. Ultimately, here, it is not necessary to resolve the legal conundrum. Both tests "require the [c]ourt to inquire into the nature, context, and history" of the Monument and lead to the same result. *See Hewett*, 29 F.Supp.3d at 611 (citing *Trunk*, 629 F.3d at 1107). Even if Justice Breyer's opinion in *Van Orden* controls, the *Lemon* test remains a "useful guidepost[ ]" for the court's analysis. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring).

B. Lemon Test

As noted above, "[t]o pass muster under the Establishment Clause, government conduct must be driven in part by a *secular purpose*; (2) must have a *primary effect* that neither advances nor inhibits religion; and (3) must not *excessively entangle* church and State." *Moss*, 683 F.3d at 608 (emphases in original) (citing *Lemon*, 403 U.S. at 612–13). Additionally, as part of *Lemon*'s second prong, the Fourth Circuit examines "whether the governmental use of an object with religious meaning . . . ha[s] the effect of 'endorsing' religion." *Lambeth v. Bd. Of Comm'rs of Davidson Cnty.*, 407 F.3d 266, 269 (4th

Cir. 2005) (citing *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 593–94 (1989)).

1. Secular Purpose

The secular purpose prong of the *Lemon* test "presents a 'fairly low hurdle, which may be cleared by finding a plausible secular purpose.' " *Glassman*, 628 F.3d at 146 (quoting *Ehlers–Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283, 288 (4th Cir. 2000)). The government's purpose need not be "exclusively secular," *Jenkins v. Kurtinitis*, No. ELH-14-1346, 2015 WL 1285355, at *28 (D.Md. Mar. 20, 2015) (citing *Brown v. Gilmore*, 258 F.3d 265, 276 (4th Cir. 2001)), as long as the government action is not "entirely motivated by a purpose to advance religion." *Hewett*, 29 F.Supp.3d at 611 (citing *Lambeth*, 407 F.3d at 270). "Under applicable Supreme Court precedent, a 'legitimate secular purpose' supporting a challenged governmental action will suffice to satisfy the *Lemon* test's first prong . . . unless the alleged secular purpose is in fact pretextual." *Lambeth*, 407 F.3d at 270 (citing *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 308–09 (2000); *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984)). Courts should "not lightly attribute unconstitutional motives to the government, particularly where [it] can discern a plausible secular purpose." *Hewett*, 29 F.Supp.3d at 612 (quoting *Davenport*, 637 F.3d at 1118) (internal quotation marks omitted).

Plaintiffs argue that displaying the Monument has a religious purpose. First, they argue that a Latin cross, which the Monument is, is "patently religious." (ECF No. 80-1, at 29-30). Plaintiffs also argue that the history of the cross "underscores its religious purpose." (*Id.* at 30-32). They also contend that the

use of a religious symbol to achieve a secular goal is impermissible when a non-religious means will suffice. Defendants assert that the Commission's sole purpose for acquiring the land in the 1960s was not religious because it acquired the land for "highway expansion, traffic safety, protection of the Legion's residual property interests, [and] historic preservation" reasons. (ECF No. 83-1, at 46). Defendants also argue that, even if the intent of the Monument's builders is relevant, the record shows that their intent was "commemorative rather than religious." (*Id.* at 47-52).

Although the Latin cross is undeniably a religious symbol, "[t]he fact that the monument conveys some religious meaning does not cast doubt on the [government's] valid secular purposes for its display." *Hewett*, 29 F.Supp.3d at 612 (citing *City of Elkhart v. Books*, 532 U.S. 1058, 1062 (2001)); *see also Buono*, 559 U.S. at 715 (plurality opinion) ("Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message."); *Mellen v. Bunting*, 327 F.3d 355, 374 (4th Cir. 2003) (assuming a secular purpose even though school-sponsored prayer "is plainly religious in nature"). Other courts have recognized that displaying a cross to honor fallen soldiers is a legitimately secular purpose, and does not always promote a religious message. *See Buono*, 559 U.S. at 715 (plurality opinion) (noting that "those who erected the cross intended simply to honor our Nation's fallen soldiers"); *Davenport*, 637 F.3d at 1118 (determining that the intent to use crosses for fallen state trooper memorials was not religious,

partly because it was inspired by crosses in military cemeteries).

The focus of the first *Lemon* prong is "on the *government's* purpose, not that of a private actor." Davenport, 637 F. 3d at 1118. The alleged government conduct challenged in the complaint is the "ownership, maintenance and prominent display on public property" of the Monument. (ECF No. 1 ¶ 55). The Commission's actions are clearly driven by a plausible, legitimate secular purpose. The Commission owns the Monument and surrounding land because it sits in the median of a busy highway interchange. The government determined that private ownership of the median would "create a serious menace to traffic" in light of increased use of the surrounding roads. (ECF No. 83-40, at 2). It is the government's secular responsibility to maintain the land on which the Monument sits just as it would any other highway median. In addition, the Commission's maintenance and display of the Monument independent of traffic concerns is also driven by a secular purpose, maintaining and displaying a "historically significant war memorial" that has honored fallen soldiers for almost a century. *See Trunk*, 629 F.3d at 1108 (holding that the government, in acquiring a memorial in the shape of a cross, articulated a plausible, legitimate secular purpose of "preserv[ing] a historically significant war memorial"). Nothing in the record indicates that the Commission's maintenance and display of the Monument is driven by a religious purpose whatsoever. The evidence of the Commission's secular purpose is uncontroverted.

Even the purpose of the private citizens who were behind the Monument's construction 90 years ago was a predominantly secular one. Plaintiffs refer to remarks made throughout the existence of the Monument in an attempt to illustrate its religious nature. (ECF Nos. 80-1, at 30-32; 90, at 52-55). Notably, a fundraising pledge sheet that was circulated contained expressly religious language (ECF No. 80-32, at 3 ("We, the citizens of Maryland, trusting in God, the supreme ruler of the universe, pledge faith in our brothers.")); the Monument was sometimes described in religious terms such as "Cross of Calvary" and "Sacrifice Cross" (ECF No. 80-26); and many events at the Monument contain some religious components (ECF Nos. 80-51; 83-68). Even if these statements or events carry some religious meaning, they do not show an "entirely religious purpose" for the Monument, and, in fact, there is overwhelming evidence in the record showing that the predominant purpose of the Monument was for secular commemoration. The Monument's groundbreaking was a predominantly secular affair that also included the groundbreaking of the National Defense Highway. (ECF No. 83-25, at 2-3). Additionally, although the construction of a cross can be for a religious purpose, in the period immediately following World War I, it could also be motivated by "the sea of crosses" marking graves of American servicemen who died overseas. (ECF No. 83-5, at 14); *cf. Davenport*, 637 F.3d at 1118. The Monument's secular commemorative purpose is reinforced by the plaque, the American Legion's seal, and the words "valor," "endurance," "courage," and "devotion" written on it. None of these features contains any religious reference. In short, the record

amply demonstrates that the construction and maintenance of the Monument "was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation's fallen soldiers." *Buono*, 559 U.S. at 715 (plurality opinion).

The ownership, maintenance, and display of the Monument by the Commission thus easily satisfies the purpose prong of the *Lemon* test.

2. Primary Effect

Lemon's second prong requires the court to determine if the challenged display's "principal or primary effect is to advance or inhibit religion." *Lambeth*, 407 F.3d at 270. The primary question is "whether an informed, reasonable observer would view the display as an endorsement of religion." *Id.* at 272. "[T]he reasonable observer is aware of the *purpose, context, and history* of the symbol at issue." *Hewett*, 29 F.Supp.3d at 613 (emphasis in original) (quoting *Davenport*, 637 F.3d at 1119). "The inquiry is not 'whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the government] endorses religion.'" [8] *Id.* at 613 (emphases in original) (quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in the judgment)). The Ninth Circuit noted that in determining the effect of symbols such as the

[8] It is for this reason that the parties' inclusion of individuals' reactions to the Monument is not particularly relevant or helpful for the reasonable person analysis.

Monument, courts "must consider fine-grained, factually specific features of the Memorial, including the meaning or meanings of the Latin cross[,] . . . the Memorial's history, its secularizing elements, its physical setting, and the way the Memorial is used." *Trunk*, 629 F.3d at 1110. "Secular elements, coupled with the history and physical setting of a monument or display, can—but do not always—transform sectarian symbols that otherwise would convey a message of government endorsement of a particular religion." *Id.* at 1117. The Ninth Circuit's framework provides a helpful approach to assessing the effect of the Monument, which is similar, but not identical, to the memorial at issue in *Trunk*.

Plaintiffs argue that the Monument endorses religion because, "as a Christian cross, it is inherently religious." (ECF No. 90, at 56). Additionally, Plaintiffs assert that the prominence of the Monument on the traffic island and relative isolation from the other memorials in Veterans Memorial Park enhance its endorsement of religion. Finally, Plaintiffs argue that the history and use of the Monument "deepens its religious message." (ECF No. 80-1, at 43). Defendants counter that the Monument contains numerous secular commemorative aspects that would indicate to the reasonable observer that its purpose is commemorative rather than religious. (ECF No. 83-1, at 55). Defendants also contend that the location of the Monument within Veterans Memorial Park further supports its secular effect. (*Id.* at 56-57). Defendants also argue that the historical use of the

Monument for veterans' commemorative events strengthens its secular effect.

Plaintiffs cite multiple cases addressing a cross memorial on public land to support the proposition that "courts have been virtually unanimous in concluding that the government's display of a cross on public property unconstitutionally endorses and advances Christianity." (ECF No. 80-1, at 37). This assertion ignores the key factual distinctions between the cases Plaintiffs cite and the Monument. In *Trunk*, for example, the history and setting of the cross memorial were overtly religious. The cross in *Trunk* sat from 1913 until the 1990s as an unadorned cross without "any physical indication that it was a memorial." *Trunk*, 629 F.3d at 1102. Rather than hosting annual commemorative events on Memorial Day and Veterans Day, the *Trunk* cross hosted religious Easter services and only a "few scattered [veterans] memorial services before the 1990s." *Id.* Throughout its history, the *Trunk* cross "functioned as a holy object, symbol of Christianity, and a place of religious observance." *Id.* at 1120. The Ninth Circuit suggested that the *Trunk* cross was repurposed primarily as a war memorial partly in response to litigation. *Id.* at 1102. The cross memorials at issue in other cases were similarly imbued with long-standing and explicit religious histories. *See, e.g., Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (cross was initially erected for religious purposes but later deemed to be a "memorial of veterans to all wars"); *Gonzales v. North Tp. Of Lake Cnty., Ind.*, 4 F.3d 1412 (7th Cir. 1993) (lone crucifix with no secular effect other than "landmark status");

Am. Civil Liberties Union of Ga. v. Rabun Cnty., 698 F.2d 1098 (11th Cir. 1983) (cross was dedicated on Easter and only secular purpose was tourism). Conversely, the Monument contains secular elements on its face (the plaque; the American Legion Seal; the words "valor," "endurance," "courage," "devotion"), has functioned expressly and overtly as a war memorial for its entire history, and sits amidst other secular memorials in Veterans Memorial Park. Although the record indicates that there were three isolated religious services held at the Monument, the predominant and nearly exclusive use of the Monument has been for annual commemorative events held on Memorial Day and Veterans Day. (*See* ECF Nos. 80-51; 83-60, at 18).[9] In light of this history and context, of which a reasonable observer would be aware, the Monument "evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten." *Buono*, 559 U.S. at 721, 130 S.Ct. 1803 (plurality opinion). The evocation of foreign graves is particularly relevant here because, unlike crosses challenged in other cases, the Monument explicitly memorializes forty-nine servicemen who died in Europe during World War I, and the "cross developed into a central symbol of the American

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[9] Plaintiffs refer to invocations and benedictions at these events as "prayers." Such activities at public ceremonies, outside of the public school context, generally do not violate the Establishment Clause. *Town of Greece, N.Y. v. Galloway*, 134 S.Ct. 1811 (2014); *Newdow v. Roberts*, 603 F.3d 1002, 1019–21 (D.C.Cir. 2010) (Kavanaugh, J., concurring in the judgment), cert. denied, 563 U.S. 1001 (2011).

overseas cemetery" during and following World War I. (*See* ECF Nos. 83-5, at 16-17; 8321).

Controlling Fourth Circuit precedent also supports Defendants' assertion that the Monument does not have the effect of endorsing religion. The Fourth Circuit has addressed other passive displays of alleged religious significance in *Lambeth* and *Smith v. Cnty. of Albemarle, Va.*, 895 F.2d 953 (4th Cir. 1990). In *Lambeth*, the Fourth Circuit held that the inscription of the motto "In God We Trust" on the county government center did not violate the Establishment Clause because a reasonable observer would not "fairly understand the purpose of the message 'in its particular physical setting' to impermissibly advance or endorse religion." *Lambeth*, 407 F.3d at 272 (quoting *Cnty. Of Allegheny*, 492 U.S. at 598–600). In *Smith*, the Fourth Circuit held that a crèche scene on the front lawn of the county office building did violate the Establishment Clause because it "was not associated with any secular symbols or artifacts" other than a small disclaimer that the display was not sponsored by the government, but rather by the Charlottesville Jaycees." *Smith*, 895 F.2d at 958. Here, the Monument is surrounded by secular symbols of commemoration throughout Veterans Memorial Park. (ECF No. 83-3). The cross itself is adorned with prominent secular symbols. (ECF No. 83-2). In addition, rather than being placed prominently in front of a governmental building, the Monument is on a highway median as part of a larger park that has become the "focus of the County's remembrance of its veterans and war dead." (ECF No. 83-8, at 2). Within the context of its long history and the setting

of Veterans Memorial Park, a reasonable observer would not view the Monument as having the effect of impermissibly endorsing religion.

3. Excessive Entanglement

Lemon's third prong requires courts to assess whether "the challenged display has created an 'excessive entanglement' between government and religion." *Lambeth*, 407 F.3d at 272–73. The Fourth Circuit has noted that "[t]he kind of excessive entanglement of government and religion precluded by *Lemon* is characterized by 'comprehensive, discriminating, and continuing state surveillance' of religious exercise." *Id.* at 273 (quoting *Lemon*, 403 U.S. at 619, 91 S.Ct. 2135). Considering the inscription of "In God We Trust" in the county government center, the Fourth Circuit held that it was not excessive entanglement because the display did "not require pervasive monitoring or other maintenance by public authorities." *Id.* Here, Plaintiffs argue that the Commission's "expenditure of funds to maintain and light" the Monument excessively entangles government and religion.[10] (ECF No. 80-1, at 53). However, "entanglement between church and state becomes constitutionally excessive only when it has the effect of advancing or inhibiting religion." *Hewett*, 29 F.Supp.3d at 618 (citations and internal quotation marks omitted).

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[10] Plaintiffs also argue that the existence of the cross creates "religion-based political division" in violation of *Lemon*' s third prong. (ECF No. 80-1, at 52). The Fourth Circuit has indicated, however, that this "political divisiveness rubric" is limited to assessing government funding of religious schools, and "is thus inapplicable to the circumstances of this case." *Lambeth*, 407 F.3d at 273.

Accordingly, courts often view *Lemon*'s third prong "as an aspect of the second." *Id.* Here, for reasons discussed in the preceding section, the Commission's display and maintenance of the Monument is not an endorsement of religion. The Monument and Veterans Memorial Park are secular war memorials that host numerous commemorative events. The Monument is located on a median of a busy highway interchange. The fact that the Commission has spent money on maintenance and upkeep of the Monument and surrounding park does not represent unconstitutional entanglement because the Monument itself is not a governmental endorsement of religion. The provision of maintenance and repairs for the Monument and the median does not constitute "continued and repeated government involvement with *religion*." *Lambeth*, 407 F.3d at 273 (emphasis added). Rather, as discussed in relation to *Lemon*'s purpose prong, the Commission undertakes maintenance of the Monument and surrounding land for traffic safety and commemorative purposes. In short, the Commission's maintenance of a war memorial on a highway median does not implicate any of the evils against which *Lemon*'s third prong protects.

C. *Van Orden*

Despite continued judicial use of the *Lemon* test to assess the constitutionality of such displays, a 2005 plurality of the Supreme Court determined that the *Lemon* test "is not useful in dealing with [such] passive monument[s]." *Van Orden*, 545 U.S. at 686

(plurality opinion).[11] The Fourth Circuit applied the "legal judgment" test from Justice Breyer's *Van Orden* concurrence in holding that reciting the Pledge of Allegiance in public school did not violate the Establishment Clause. *Myers*, 418 F.3d at 402. The Ninth Circuit applied a hybrid of *Lemon* and *Van Orden* in determining that the cross in *Trunk* was unconstitutional. *Trunk*, 629 F.3d at 1107.

Here, for many of the same reasons discussed in the application of the *Lemon* test, the Monument does not violate the Establishment Clause under *Van Orden*'s legal judgment test. As in *Lemon*, it is essential to consider the context and history of the display to determine its constitutionality. *See Van Orden*, 545 U.S. at 701 (Breyer, J., concurring). The Monument was constructed and financed by the American Legion and a private group of citizens whose purpose was to remember and honor Prince George's County's fallen soldiers. *See Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) (noting the secular purpose of the display's founders). The American Legion's seal is "displayed on the [Monument], prominently acknowledg[ing] that the [American Legion] donated the display, a factor which, though not sufficient, thereby further distances" the Commission from any potential religious aspect of the Monument. *Id.* Furthermore,

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[11] Justice Breyer noted that *Van Orden* was most applicable in "borderline cases" because applying Lemon would be difficult. *Van Orden*, 545 U.S. at 700 (Breyer, J. concurring). The facts, history, and context of the Monument do not present a particularly difficult "borderline" *Lemon* analysis. A brief discussion of *Van Orden* is warranted, however, due to the uncertain status of Establishment Clause jurisprudence.

the Monument is located in Veterans Memorial Park and is surrounded by other war memorials and secular monuments. (ECF No. 83-3); *see Van Orden*, 545 U.S. at 702 (Breyer, J., concurring) ("The physical setting of the monument, moreover, suggests little or nothing of the sacred."). Much like the Ten Commandments display in *Van Orden*, the location of the Monument "does not readily lend itself to meditation or any other religious activity." *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring). Rather, the location among the other monuments of Veterans Memorial Park underscores its secular and commemorative nature. In addition, the Monument has gone unchallenged for decades. *See id.* at 702–03 (discussing how the fact that the monument existed for 40 years before a legal challenge shows that "few individuals...[were] likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort" to promote or endorse religion). Finally, the Monument has been used almost exclusively as a site to commemorate veterans on secular patriotic holidays for its entire history. (ECF Nos. 80-41; 83-1, at 35-36; 83-9, at 6; 83-11, at 9-11; 83-60, at 18). As the Ninth Circuit acknowledged in Trunk, "[t]he Ten Commandments monuments at issue in [*Van Orden*] passed muster in part because they were *not* used as religious objects - they simply adorned the grounds of their respective government buildings in the company of other monuments." *Trunk*, 629 F.3d at 1120. Conversely, the cross in *Trunk* had a long history of hosting religious Easter services and had "no physical indication of any secular purpose" for much of its history, "during which it served primarily as a site of religious observance." *Id.* at 1121.

For the foregoing reasons, the Monument satisfies both the *Lemon* test and the "legal judgment" test from *Van Orden*.

D. Motions for Leave to File *Amici Curie* Memoranda

Also pending are three motions for leave to file a memorandum as amicus curiae. One motion was filed in support of Defendants on September 15, 2015 by the same eleven individuals and the Veterans of Foreign Wars of the United States who filed in 2014, and the motion contains a memorandum that is "essentially identical to the original memorandum" previously filed. (ECF No. 94). On October 1, 2015, two motions in support of Plaintiffs were filed by the Center for Inquiry Responses and CAIR. (ECF Nos. 95; 96). Memoranda are not attached to these two motions for leave. As the undersigned discussed in a prior memorandum opinion:

> There is no Federal Rule of Civil Procedure that applies to motions for leave to appear as amicus curiae in a federal district court. District courts therefore have discretion whether to grant or deny such leave and often look for guidance to Rule 29 of the Federal Rules of Appellate Procedure, which applies to amicus briefs at the federal appeals level. *See, e.g., Jin v. Ministry of State Sec.*, 557 F.Supp.2d 131, 136 (D.D.C. 2008); *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F.Supp.2d 720, 728 (D.Md. 1996); *Washington Gas Light Co. v. Prince George's County Council*, Civ. No. DCK-08-0967, 2012 WL 832756, at *3 (D.Md. Mar. 9, 2012). Rule 29 indicates that amici should state "the reason why an amicus brief is desirable and why

> the matters asserted are relevant to the disposition of the case." Fed.R.App.P. 29(b)(2). As noted by Judge Davis in *Bryant*, "[t]he aid of *amici curiae* has been allowed at the trial level where they provide helpful analysis of the law, they have a special interest in the subject matter of the suit, or existing counsel is in need of assistance." Bryant, 923 F.Supp.2d at 728 (citing *Waste Mgmt. of Pa., Inc. v. City of New York*, 162 F.R.D. 34, 36 (M.D.Pa. 1995)).

(ECF No. 46, at 5-6). At this point, the issues have been comprehensively and fully briefed by all parties. Although the prospective *amici* have demonstrated a special interest in the outcome of the suit, there are no indications that the proposed memoranda would provide helpful legal analysis beyond the thorough job done by the parties' counsel. Accordingly, the motions filed by prospective *amici curiae* will be denied and the court will not consider any documents filed by movants.

IV. Conclusion

For the foregoing reasons, the motion for summary judgment filed by Plaintiffs American Humanist Association, et al. will be denied. The motions for summary judgment filed by Defendant Maryland-National Capital Park and Planning Commission and Intervenor-Defendants American Legion, et al. will be granted. The motions for leave to file memoranda of *amici curiae* will be denied. An appropriate declaration will be entered. A separate order will follow.

/s/

DEBORAH K. CHASANOW
United States District Judge

APPENDIX C

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2597

(8:14-cv-00550-DKC)

AMERICAN HUMANIST ASSOCIATION; STEVEN LOWE; FRED EDWORDS; BISHOP MCNEILL

Plaintiffs - Appellants

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Defendant – Appellee

THE AMERICAN LEGION; THE AMERICAN LEGION DEPARTMENT OF MARYLAND; THE AMERICAN LEGION COLMAR MANOR POST 131

Intervenors / Defendants – Appellees

FREEDOM FROM RELIGION FOUNDATION; CENTER FOR INQUIRY

Amici Supporting Appellant

THE BECKETT FUND FOR RELIGIOUS LIBERTY; JOE MANCHIN; DOUG COLLINS; VICKY HARTZLER; JODY HICE; EVAN JENKINS; JIM JORDAN; MARK MEADOWS; ALEX MOONEY; STATE OF WEST VIRGINIA; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF HAWAII; STATE OF IDAHO; STATE OF INDIANA; STATE OF KANSAS; STATE OF KENTUCKY; STATE OF LOUISIANA; STATE OF MICHIGAN; STATE OF MONTANA; STATE OF NEVADA; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF RHODE ISLAND; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TEXAS; STATE OF UTAH; STATE OF VIRGINIA; STATE OF WISCONSIN

Amici Supporting Appellee

FOUNDATION FOR MORAL LAW

Amicus Supporting Rehearing Petition

Filed: March 1, 2018

ORDER

On a requested poll of the court on appellees' petitions for rehearing en banc, a majority of active judges voted to deny rehearing en banc. Judge Motz, Judge Duncan, Judge Keenan, Judge Wynn, Judge Diaz, Judge Floyd, Judge Thacker, and Judge Harris voted to deny rehearing en banc. Chief Judge Gregory, Judge Wilkinson, Judge Niemeyer, Judge

Traxler, Judge King, and Judge Agee voted to grant rehearing en banc.

The petitions for rehearing en banc are denied.

Judge Wynn filed a concurring opinion, and Chief Judge Gregory, Judge Wilkinson, and Judge Niemeyer filed dissenting opinions.

Entered at the direction of Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

WYNN, Circuit Judge, voting to Deny the Petition to Rehear:

In seeking rehearing of this case en banc, Petitioner Maryland-National Capital Park & Planning Commission, a state entity (the "Commission"), again asks this Court to hold that Maryland's ownership and maintenance of the Bladensburg Cross—a 40-foot tall Latin cross erected at an intersection in Prince George's County—*does not* have the "principal or primary effect" of advancing the Christian faith. Appellee's Pet. for Reh'g En Banc at 12. Rather, according to the Commission, this Court should conclude that the Bladensburg Cross has lost its predominantly sectarian meaning, to the extent that it ever had any such meaning, and now stands as a symbol of the soldiers who died on the field of battle in World War I.

But the Latin cross has for centuries been widely recognized as "the pre-eminent symbol of Christianity."[1] Nothing in the First Amendment

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[1] *Trunk v. City of San Diego*, 629 F.3d 1099, 1110 (9th Cir. 2011); *see also, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) ("Symbolism is a primitive but effective way of communicating ideas. The use of an emblem . . . to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. . . . [T]he church speaks through the Cross, the Crucifix, the altar and shrine, and clerical reiment."); *Salazar v. Buono*, 559 U.S. 700, 747 (2010) (Stevens, J., dissenting) ("We have recognized the significance of the Latin cross as a sectarian symbol, and no participant in this litigation denies that the cross bears that social meaning." (citing, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring in part and concurring in judgment) (expressing concern because "the cross is an especially potent sectarian symbol which stood

empowers the judiciary to conclude that the freestanding Latin cross has been divested of this predominately sectarian meaning.

Our holding that the State's ongoing ownership and maintenance of the Bladensburg Cross violated the Establishment Clause recognizes that to hold otherwise would require this Court to accept the Commission's conclusion that the Latin cross *does not* have the "principal or primary effect" of advancing the Christian faith. To give the judiciary the power to prescribe and proscribe the meaning of an unadorned, traditionally religious symbol like the Latin cross would infringe on intensely personal and sacred questions of religious meaning and belief.[2] Such governmental prescription of religious belief would serve only to "degrade religion"—one of the principal outcomes the Framers of the Religion Clauses sought to forestall. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

The First Amendment provides that the government "shall make no law respecting an

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unattended in close proximity to official government buildings"); *id.* at 792 (Souter, J., concurring in part and concurring in judgment) ("[T]he Latin cross . . . is the principal symbol of Christianity around the world."); *id.* at 798 n.3 (Stevens, J., dissenting) ("[T]he Latin cross is identifiable as a symbol of a particular religion, that of Christianity; and, further, as a symbol of particular denominations within Christianity.")).

[2] According to recent polling, adults who identify as adherents of Christianity comprise approximately 75% of the United States population. *E.g.*, Frank Newport, *Percentage of Christians in U.S. Drifting Down, but Still High*, Gallup News (Dec. 24, 2015), http://news.gallup.com/poll/187955/percentage-christians-drifting-down-high.aspx.

establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Although "tension inevitably exists between the Free Exercise and the Establishment Clauses," *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973), both Religion Clauses serve at least one common purpose: the prevention of governmental interference in matters of faith.

The Free Exercise Clause, in particular, protects "first and foremost the right to believe and profess whatever religious doctrine one desires." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990), *superseded on other grounds by statute*, 42 U.S.C. §§ 2000bb-1; *see also City of Boerne v. Flores*, 521 U.S. 507, 550 (1997) (O'Connor, J., dissenting) ("[T]he historical record indicates that [the Framers] believed that the Constitution affirmatively protects religious free exercise and that it limits the government's ability to intrude on religious practice."). Put differently, the Free Exercise Clause endows individuals and religious institutions with the "power to decide for themselves, free from state interference, matters . . . of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N.A.*, 344 U.S. 94, 116 (1952). The clause, therefore, amounts to an "unflinching pledge to allow our citizenry to explore diverse religious beliefs in accordance with the dictates of their conscience." *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984). To that end, the Free Exercise Clause prohibits the government, and the judiciary in particular, from entertaining, much less resolving, questions that turn on issues of religious doctrine, practice, and belief. *See, e.g.*, *Hosanna-*

Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 188 (2012) (holding that the Free Exercise Clause prohibits courts from resolving claims "concerning the employment relationship between a religious institution and its ministers"); *Serbian E. Orthodox Diocese for U.S. and Can. v. Milivojevich*, 426 U.S. 696, 720 (1976) (holding that the "First Amendment commits exclusively to the highest ecclesiastical tribunals . . . the resolution of quintessentially religious controversies").

The Establishment Clause likewise protects against governmental interference in religious matters. As the Supreme Court has recognized, the "first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government *and to degrade religion*." *Engel*, 370 U.S. at 431 (emphasis added); *Catholic High Sch. Ass'n of Archdiocese of N.Y. v. Culvert*, 753 F. 2d 1161, 1162–63 (2d Cir. 1985) ("[The Religion Clauses] must be constantly manned, the Founding Fathers believed, lest there be a union between church and state that will first degrade and eventually destroy *both*." (emphasis added)). "The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." *Engel*, 370 U.S. at 431–32. In other words, the Establishment Clause protects "not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree . . . the devout believer who fears the secularization of a creed which becomes too

deeply involved with and dependent upon the government." *School of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 258 (1963) (Brennan, J., concurring).

The Religion Clauses' animating concern with governmental intrusion on and degradation of religious belief stems from the colonists' experience and unease with the consequences of state control over religious institutions and beliefs. The Puritans fled England to escape the monarchy's prescription of tenets of belief and modes of worship. *Hosanna-Tabor*, 565 U.S. at 182–83. And other settlers sought to escape what they saw as "the corruptive influence of secular statism on religious purity." *Brandon v. Bd. of Educ. of Guilderland Cent. Sch. Dist.*, 635 F.2d 971, 974 (2d Cir. 1980). As James Madison, the principal drafter of the Religion Clauses, explained, "experience" revealed "that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 7 (1785), *in* II Writings of James Madison 187 (1901), and quoted in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 67 (1947) [hereinafter *Remonstrance*].

To allow this Court to circumscribe the Bladensburg Cross's meaning and power, as the Commission and its amici request, would empower this Court to diminish the Latin cross's many years of accrued religious symbolism, and thereby amount to the state degradation of religion that the Framers feared and sought to proscribe. Indeed, were this Court to accept that the Latin cross's predominantly sectarian meaning could be overcome by a plaque, a

small secular symbol, and four engraved words, as the Commission maintains, we would necessarily grant the government—and the judiciary, in particular—broad latitude to define and shape religious belief and meaning. Surely, the Constitution does not contemplate endowing the government with such extraordinary power to determine and prescribe individual citizens' religious beliefs and religious communities' joint understandings, appreciations, and teachings. *See, e.g.*, *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632–33 (1943) ("A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.").

Importantly, this is not a case in which a religious symbol or text is displayed as part of historical presentation that has a predominately secular purpose. *See Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring) (surrounding context revealed Ten Commandments display conveyed primarily historical and moral meaning). Nor is it a case in which the government is displaying a religious symbol as a "historical artifact," thus permitting each individual to imbue the symbol with her own meaning. *See Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 238–42 (2d Cir. 2014) (surrounding context of display in 9/11 museum of "cross-shaped artifact" that naturally appeared in wreckage of the World Trade Center demonstrated that artifact was displayed, not for a religious purpose, but to "provid[e] accurate historical insight into the various means by which people tried to cope with the devastation of the September 11 attacks"). Rather, it is a case in which the Commission and its

religiously affiliated amici ask the judiciary to strip a long-recognized, "pre-eminent symbol" of a religion of its predominantly sectarian meaning. *See, e.g.*, *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1122–23 (10th Cir. 2010) (concluding Latin crosses that state erected to commemorate deaths of law enforcement officers, otherwise devoid of context, retained predominantly religious meaning, notwithstanding state's claim that cross had "become a secular symbol of death").

Otherwise put, to accept the Commission's assertion that the Latin cross erected at the Bladensburg intersection does not convey a predominantly sectarian message would prohibit the ability of those who raised the symbol to prominence to continue to safeguard and define its primary meaning. Indeed, sanctioning a governmental body's attempt to imbue a traditionally religious symbol, like the Latin cross, with secular meaning poses the risk that "religion may be compromised as political figures reshape the religion's beliefs [or symbols] for their own purposes." *Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring). And permitting government to serve as the arbiter of religious belief and meaning would "weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits." *See Remonstrance* ¶ 6.

If the Latin cross here at issue is more overtly secular than sectarian, as the Commission and amici maintain, then their concern that altering or removing the monument would be "hostile" to

religious beliefs is puzzling. If, on the other hand, the Commission and its amici's concern that removing the Bladensburg Cross would amount to judicial hostility towards religion stems from the fact that the Latin cross continues to stand in their minds as a potent religious symbol, then permitting the cross to stand on governmental property would diminish the power of that symbol, as such a resolution entails a judicial finding that the cross is *not* a predominantly religious symbol. Perhaps De Tocqueville put it best in his 1840 reflections upon democracy in the United States, in which his travels through our country revealed that "the spirit of religion and the spirit of freedom . . . were intimately united":

> [W]hen a religion contracts an alliance [with government], . . . it commits the same error as a man who should sacrifice his future to his present welfare; and in obtaining a power to which it has no claim, it risks that authority which is rightfully its own. When a religion founds its empire upon the desire of immortality which lives in every human heart, it may aspire to universal dominion; but when it connects itself with a government, it must necessarily adopt maxims which are only applicable to certain nations. Thus, in forming an alliance with a political power, religion augments its authority over a few, and forfeits the hope of reigning over all.
>
> As long as a religion rests upon those sentiments which are the consolation of all affliction, it may attract the affections of mankind. But if it be mixed up with the bitter passions of the world, it may be

> constrained to defend allies whom its interests, and not the principle of love, have given to it.

Alexis de Tocqueville, *Democracy in America* vol. I, ch. XVII, pt. III (Henry Reeve ed. 2006).

We should be wary of allowing the government—however innocuous such an allowance may initially seem—to define the principal meaning of a symbol that otherwise would be defined by those individuals to whom it brings meaning. "In America, religion . . . restricts itself to its own resources, but of those none can deprive it: its circle is limited to certain principles, but those principles are entirely its own, and under its undisputed control." *Id.* As long as that control endures, "religion is sustained by those feelings, propensities, and passions which are found to occur under the same forms, at all the different periods of history, [and therefore] may defy the efforts of time; or at least . . . can only be destroyed by another religion. But when religion clings to the interests of the world, it becomes almost as fragile a thing as the powers of earth." *Id.*

Sentiments aside, the majority opinion is a faithful application of the law.

GREGORY, Chief Judge, dissenting from the denial of rehearing en banc, in which Judge WILKINSON and Judge AGEE join:

I would grant rehearing en banc for the reasons expressed in my dissent to the panel decision. *See Am. Humanist Ass'n v. Maryland–National Capital Park & Planning Comm'n*, 874 F.3d 195, 215–22 (4th Cir. 2017) (Gregory, C.J., concurring in part and dissenting in part). I do not write to discuss further my legal analysis and reasoning. Instead, I join Judge Wilkinson's eloquent dissent from the denial of rehearing en banc and give these few thoughts.

Unlike the sprawling acres of Arlington National Cemetery, Veterans Memorial Park has a single monument on a tiny plot of land that honors local soldiers who died defending their country in World War I. But like the lives of the fallen heroes it honors, what the Park lacks in length it makes up in height. Nearly a century ago, Maryland citizens, out of deep respect and gratitude, took on the daunting task of erecting a monument to mirror the measure of individual devotion and sacrifice these heroes had so nobly advanced. The panel majority says their effort violates the Constitution the soldiers fought to defend. I, respectfully, think otherwise. But wherever one's views fall on this matter, I am certain that it raises an important question worthy of the full Court's review.

WILKINSON, Circuit Judge, with whom Chief Judge GREGORY and Judge AGEE, join, dissenting from the denial of rehearing en banc:

I would grant rehearing en banc for the reasons expressed in Chief Judge Gregory's dissent to the panel decision. *See Am. Humanist Ass'n v. Maryland–National Capital Park & Planning Comm'n*, 874 F.3d 195, 215–222 (4th Cir. 2017) (Gregory, C.J., concurring in part and dissenting in part). I add only these few thoughts.

Forty-nine names appear on the plaque at the base of the Great War memorial in Prince George's County. Aggregate figures do not do justice to individual soldiers. Each name marks the tragedy of a life lost before its time. Each death marks a worthy sacrifice.

We honor those Americans who died serving their country in different ways. Families respect their fallen sons and daughters in pictures, prayers, and memory. Their country honors them in ceremony, as at Memorial Day, but more often with quietude.

The dead cannot speak for themselves. But may the living hear their silence. We should take care not to traverse too casually the line that separates us from our ancestors and that will soon enough separate us from our descendants. The present has many good ways of imprinting its values and sensibilities upon society. But to roil needlessly the dead with the controversies of the living does not pay their deeds or their time respect.

This memorial and this cross have stood for almost one full century. Life and change flow by the small park in the form of impatient cars and trucks. That

is disturbance enough. Veterans Memorial Park may not be Arlington National Cemetery, but it is the next thing to it. I would let the cross remain and let those honored rest in peace.

NIEMEYER, Circuit Judge, dissenting from the denial of rehearing en banc:

Although the Establishment Clause allows monuments that include religious symbols or texts to stand on public lands, *see Van Orden v. Perry*, 545 U.S. 677 (2005), the majority rules that an almost 100-year old monument commemorating soldiers from Prince George's County who died in World War I must be removed because it is shaped in a large Celtic cross. The holding not only violates *Van Orden*, it also needlessly puts at risk hundreds of monuments with similar symbols standing on public grounds across the country, such as those in nearby Arlington National Cemetery, where crosses of comparable size stand in commemoration of fallen soldiers. Because this ruling has such far-reaching and unnecessary consequences, it should be reheard by our court en banc, and I dissent from the vote not to do so.

The mothers of soldiers who died during World War I and other private citizens in Prince George's County, Maryland, erected a memorial almost 100 years ago commemorating the soldiers' service to the Nation. The memorial, which consists of a large concrete Celtic cross on a pedestal, includes on four sides the words "Valor," "Endurance," "Courage," and "Devotion" and a plaque stating: "This Memorial Cross Dedicated to the Heroes of Prince George's County, Maryland Who Lost Their Lives in the Great War for the Liberty of the World." The plaque also includes the names of the 49 men who are commemorated by the monument and a quote from President Wilson, stating, "The right is more precious than peace. We shall fight for the things we

have always carried nearest our hearts. To such a task we dedicate our lives." The monument's use of the cross shape mirrors the custom in Europe during World War I where "the Cross became the principal grave marker" in cemeteries where soldiers were buried.

The monument at issue in this case stands in Veterans Memorial Park and is surrounded by numerous other monuments commemorating those who died in the Nation's conflicts, including a World War II Honor Scroll, a Pearl Harbor Memorial, a Korea-Vietnam Veterans Memorial, a September 11 Memorial Garden, a large Battle of Bladensburg Memorial, and two 38-foot-tall statutes of soldiers, one British and one American, facing each other across a bridge. Some of these monuments are as tall as the monument at issue in this case. Moreover, within 40 miles of the monument are other similar monuments commemorating lost soldiers and incorporating Christian symbols, such as the Wayside Cross in Towson, Maryland, the Victory Cross in Baltimore, and the Argonne Cross and the Canadian Cross of Sacrifice in Arlington National Cemetery.

In 1961, the property on which the monument was erected was deeded to the Maryland-National Capital Park and Planning Commission because it had become a highway safety issue due to the monument's location in the median of the busy intersection of U.S. Route 1 and Maryland Route 450. It is now maintained by the Commission. Since 1961, however, the monument has continued to be used during relevant holidays to commemorate those who died in war.

Until this action was filed by persons who claim to be offended by the presence of the monument, no complaint had been made about its presence or its use of a Christian symbol.

The panel, in a 2-1 decision, will now have the monument removed or destroyed because, as it concludes, its presence on public land amounts to a violation of the Establishment Clause, although no Supreme Court case has ever held that the Establishment Clause prohibits such monuments. Indeed, it has held to the contrary — that "the Establishment Clause of the First Amendment *allows* the display" of monuments like the one here. *Van Orden*, 545 U.S. at 681 (emphasis added) (plurality opinion) (holding that the Establishment Clause allows a large granite monument inscribed with the Ten Commandments to stand on the grounds of the Texas State Capitol); *id.* at 700–01, 703–04 (Breyer, J., concurring in the judgment). The panel opinion seeks to distinguish *Van Orden* on the ground that the cross as a symbol "differs from other religious monuments, such as the Ten Commandments" because the Ten Commandments is "well known as being tied to our Nation's history and government" and because, unlike the monument at issue in *Van Orden*, the monument here is "conspicuously displayed at a busy intersection." The panel further rationalizes that when crosses are ordinarily used to commemorate fallen soldiers, such as in Arlington National Cemetery, they "are much smaller than the 40-foot tall monolith at issue here." The opinion, however, fails to recognize that there are similarly sized monuments incorporating crosses in the Arlington National Cemetery — indeed, also

elsewhere nearby. The panel opinion directs the district court, which had held that the Establishment Clause was not violated by the monument, to consider on remand whether the arms of the cross should be "remov[ed]" or the cross entirely "raz[ed]," or other "arrangements [could be made] that would not offend the Constitution."

The Supreme Court has adopted numerous tests for deciding Establishment Clause cases, and it debated in *Van Orden* which might apply in assessing monuments on public lands that contain religious symbols. 545 U.S. 683–88 (plurality opinion) (canvassing the various tests that have been applied in varying circumstances); *id.* at 698 (Breyer, J., concurring in the judgment) (noting that there is "no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible") (internal quotation marks and citation omitted). Ultimately, the Court, in determining whether "passive monuments" on public grounds that include religious symbols violate the Establishment Clause, justified its decision "both by the nature of the monument and by our Nation's history." *Id.* at 686 (plurality opinion); *see also id.* at 703–04 (Breyer, J., concurring in the judgment) ("I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves"). Specifically, the Court held that "a large granite monument bearing the text of the Ten Commandments located on the grounds of the Texas State Capitol" was allowed by the Establishment Clause, despite the Court's recognition that the Ten

Commandments' text "has a religious message." 545 U.S. at 700 (Breyer, J., concurring in the judgment); *see also id.* at 690 (plurality opinion). The Court's conclusion was based on the following observations that it made about the monument at issue there: (1) that the text on the monument conveyed both a "religious message" and a "secular moral message"; (2) that the monument has stood in a secular setting on Capitol grounds for some 40 years; (3) that the monument was donated by a private, "primarily secular" organization to highlight the Ten Commandments' role in "shaping civil morality"; (4) that the monument's physical setting "suggest[ed] little or nothing of the sacred," as it sat "in a large park containing 17 monuments and 21 historical markers"; and (5) that over a period of 40 years, the monument "went unchallenged" until the present case. *Id.* at 701–02 (Breyer, J., concurring in the judgment); *see also id.* at 681, 688–92 (plurality opinion).

It strains established judicial analysis to conclude that *Van Orden* does not allow the monument in this case to stand as a secular memorial to the lives of soldiers lost during war in service of the Nation. The panel decision not only wrongly distinguishes *Van Orden*, but, in doing so, also offends the monument's commemoration of those soldiers' sacrifice. Moreover, it puts at risk hundreds, and perhaps thousands, of similar monuments. The Establishment Clause was never intended to be so interpreted, and the Supreme Court has never so interpreted it.

Our vote not to rehear this case en banc is an unfortunate misstep.

No. 18-18

In The
Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK
AND PLANNING COMMISSION,

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The government publicly defends its 40-foot-tall Christian cross monolith even though its officials have expressed relief at the prospect of it crumbling down on its own.

Conceived as a mammoth "Calvary Cross"—symbolic of the crucifixion of Jesus Christ—the cross was constructed on town property in a three-way highway median, which is now the county's busiest intersection. When the cross was first dedicated in 1925 in a ceremony replete with Christian clergy-led prayers and the involvement of local, state, and federal officials, the keynote speaker, a state representative, proclaimed the cross to be "symbolic of Calvary." Virtually every event held at the cross has featured Christian-themed prayers.

In 1985, the government spent $100,000 renovating the cross, followed by an elaborate "Rededication Ceremony," dedicating the cross to veterans of *all* wars. Despite spending an additional $17,000 on routine maintenance, the cross remains in critical condition and even poses a safety hazard. In 2008, the government set aside $100,000 to resuscitate this rapidly deteriorating Christian memorial, but officials recently indicated that it is likely beyond repair. The questions presented are:

1. Did the Fourth Circuit correctly determine that, in light of its size, history, and context, the government's Christian cross—the preeminent symbol of

QUESTIONS PRESENTED—Continued

Christianity—endorses Christianity, not only above all other faiths, but also to their exclusion?

2. Did the Fourth Circuit correctly determine, consistent with every other circuit decision involving a memorial cross, that a government's Christian cross war memorial, towering over a busy highway intersection, gives the impression to reasonable observers that Christian veterans are being honored to the exclusion of all others?

3. Did the Fourth Circuit correctly determine that the government's funding, restoration, monitoring, and ongoing maintenance of an enormous Christian symbol that dominates its surroundings foster excessive entanglement with religion?

LISTINGS OF PARTIES TO PROCEEDINGS

The petition correctly states the names of all parties to this case.

RULE 29.6 STATEMENT

Respondent American Humanist Association is a nonprofit corporation, exempt from taxation under 26 U.S.C. § 501(c)(3). It has no parent or publicly held company owning ten percent or more of the corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LISTINGS OF PARTIES TO PROCEEDINGS	iii
RULE 29.6 STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
JURISDICTION	1
INCORPORATION BY REFERENCE	1
INTRODUCTION	1
COUNTERSTATEMENT OF THE CASE	5
REASONS FOR DENYING THE WRIT	8
I. The case is unripe for this Court's review	9
II. The Fourth Circuit's narrow fact-specific decision neither hinders the government's ability to honor its war dead nor threatens any other monument	9
A. Modifying the monument to honor all veterans advances religious liberty and equality	9
B. The government's Christian cross war memorial co-opts spiritual content for military purposes, offending many Christians	14
C. No other monument is affected by the Fourth Circuit's fact-intensive ruling	16

TABLE OF CONTENTS—Continued

Page

III. There is no Circuit split 20

A. The Circuits agree that a Christian cross does not serve as a *secular* symbol of commemoration 20

B. The Commission misconstrues the Circuits' decisions to manufacture a split 21

1. The Second and Fifth Circuits never ruled on the constitutionality of a war memorial cross 21

2. The Fourth, Ninth, and Tenth Circuits' decisions do not impose a *per se* prohibition against crosses 23

C. The Circuits do not disagree on what knowledge to attribute to the reasonable observer 26

D. The Circuits do not disagree on the relevance of longevity and history in cross cases 28

IV. The Fourth Circuit reached the correct result in accordance with this Court's precedents 31

A. There is no conflict with *Lynch* 34

B. There is no conflict with *Buono* 36

C. There is no conflict with *Van Orden* 41

CONCLUSION 43

TABLE OF AUTHORITIES

Page

CASES

ACLU of Kentucky v. Mercer County, 432 F.3d 624 (6th Cir. 2005) 27

ACLU v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986) 23, 27, 35, 36

ACLU v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983) 23, 37

Adland v. Russ, 307 F.3d 471 (6th Cir. 2002) 27

American Atheists, Inc. v. Duncan, 616 F.3d 1145 (10th Cir. 2010) 20, 21, 25, 26, 36

American Atheists, Inc. v. Port Authority, 760 F.3d 227 (2d Cir. 2014) 21, 22

American Humanist Association v. Lake Elsinore, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014) 20

Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994) 9

Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000) 8

Briggs v. Mississippi, 331 F.3d 499 (5th Cir. 2003) 21

Buono v. Norton, 371 F.3d 543 (9th Cir. 2004) 20

Cabral v. City of Evansville, 958 F. Supp. 2d 1018 (S.D. Ind. 2013), *dismissed on other grounds*, 759 F.3d 639 (7th Cir. 2014) 20

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 2

TABLE OF AUTHORITIES—Continued

Page

Card v. City of Everett, 520 F.3d 1009 (9th Cir. 2008) 29

County of Allegheny v. ACLU, 492 U.S. 573 (1989) ..... *passim*

Doe v. Elmbrook School District, 687 F.3d 840 (7th Cir. 2012) 14

Ellis v. La Mesa, 990 F.2d 1518 (9th Cir. 1993) 20

Engel v. Vitale, 370 U.S. 421 (1962) 1, 10, 16, 32

Epperson v. Arkansas, 393 U.S. 97 (1968) 31

Friedman v. Board of County Commissioners, 781 F.2d 777 (10th Cir. 1985) 35, 37

Gilfillan v. Philadelphia, 637 F.2d 924 (3d Cir. 1980) 23

Gonzales v. North Township Lake County, 4 F.3d 1412 (7th Cir. 1993) 20, 23, 27, 35

Greater Houston Chapter of American Civil Liberties Union v. Eckels, 589 F. Supp. 222 (S.D. Tex. 1984), *reh'g denied*, 763 F.2d 180 (5th Cir. 1985) 10, 21

Green v. Haskell County Board of Commissioners, 568 F.3d 784 (10th Cir. 2009) 42

Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991) 23

Jewish War Veterans v. United States, 695 F. Supp. 3 (D.D.C. 1988) 3, 20

King v. Richmond County, 331 F.3d 1271 (11th Cir. 2003) 27

TABLE OF AUTHORITIES—Continued

Page

Kondrat'yev v. City of Pensacola, 2017 U.S. Dist. LEXIS 203588 (N.D. Fla. June 19, 2017) *appeal pending* No. 17-13025 (11th Cir. 2018) 20

Larson v. Valente, 456 U.S. 228 (1982) 32

Lowe v. Eugene, 254 Or. 518 (1969) 37

Lynch v. Donnelly, 465 U.S. 668 (1984) 17, 22, 34, 35

McCreary County v. ACLU, 545 U.S. 844 (2005) 2, 14, 17, 31, 32

Modrovich v. Allegheny County, 385 F.3d 397 (3d Cir. 2004) 27

Mount Soledad Memorial Association v. Trunk, 567 U.S. 944 (2012) 9

Murray v. Austin, 947 F.2d 147 (5th Cir. 1991) 21, 22, 23

Robinson v. City of Edmond, 68 F.3d 1226 (10th Cir. 1995) 27

Salazar v. Buono, 559 U.S. 700 (2010) ..... *passim*

Separation of Church & State Comm. v. City of Eugene, 93 F.3d 617 (9th Cir. 1996) 20, 23, 24

Skoros v. City of New York, 437 F.3d 1 (2d Cir. 2006) 18

Stone v. Graham, 449 U.S. 39 (1980) 33

Trump v. Hawaii, 138 S. Ct. 2392 (2018) 1

Trunk v. City of San Diego, 629 F.3d 1099 (9th Cir. 2011) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Trunk v. City of San Diego, 660 F.3d 1091 (9th Cir. 2011) 19

Van Orden v. Perry, 545 U.S. 677 (2005) 24, 28, 31, 33, 41

Virginia v. Black, 538 U.S. 343 (2003) 30

Wallace v. Jaffree, 472 U.S. 38 (1985) 9

Walz v. Tax Commission, 397 U.S. 664 (1970) 29

Weinbaum v. City of Las Cruces, 541 F.3d 1017 (10th Cir. 2008) 21, 25

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 15

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 31

RULES AND REGULATIONS

23 CFR § 710.403(a) 35

Sup. Ct. R. 10 8

OTHER AUTHORITIES

H.R. Res. 15, 68th Cong. (1924) 3, 40

Hemant Mehta, *Christians Are Harassing the Atheist Lawyer Who Won the Pensacola Cross Case*, PATHEOS (June 21, 2017), https://perma.cc/6KD6-LLYR 30

TABLE OF AUTHORITIES—Continued

Page

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JURISDICTION

This case is unripe for this Court's review. No final judgment has been entered. The Fourth Circuit instead left the district court wide latitude on remand to explore "arrangements that would not offend the Constitution." (Pet.App.31a-32a).

INCORPORATION BY REFERENCE

Two petitions were filed seeking review of the same decision, the first filed by the American Legion ("Legion") (17-1717), and the second filed by the Maryland-National Capital Park and Planning Commission ("Commission"). Due to substantial overlap, Respondents incorporate by reference their Brief in Opposition to the Legion's Petition ("Opp."), and attempt to avoid repetition herein.

INTRODUCTION

"'The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (quoting *Larson v. Valente*, 456 U.S. 228 (1982)). This Court has long acknowledged that governmental actions that favor one religion over others "inevitabl[y]" foster "hatred, disrespect and even contempt of those who [hold] contrary beliefs." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). For "nothing does a better job of roiling society" than "when the

government weighs in on one side of religious debate." *McCreary County v. ACLU*, 545 U.S. 844, 876 (2005). This case, unfortunately, bears that out.

The Commission is prominently displaying a massive Christian cross in the center of the busiest intersection in Prince George's County, Maryland (the "Bladensburg Cross" or "Cross").[1] Originally called the "Cavalry Cross" when it was constructed on land owned by the Town of Bladensburg ("Town"), and rededicated by the Commission in 1985 as a war memorial for all veterans, the Commission's Cross discriminates against patriotic soldiers who are not Christian, sending a callous message to non-Christians that Christians are worthy of veneration while they may as well be forgotten. *See County of Allegheny v. ACLU*, 492 U.S. 573, 615 n.61 (1989).

"The cross is of course the preeminent symbol of Christianity." *Salazar v. Buono*, 559 U.S. 700, 725 (2010) (Alito, J., concurring); *see also id.* at 747 (Stevens, J., dissenting) ("We have recognized the significance of the Latin cross as a sectarian symbol, and no participant in this litigation denies that the cross bears that social meaning."); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring) ("the cross is an especially potent sectarian symbol"); *id.* at 792 (Souter, J., concurring) (the cross is "the principal symbol of

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[1] (Pet.App.5a-10a)(J.A.33-34)(J.A.315)(J.A.360-62)(J.A.425)(J.A.579)(J.A.1098)(J.A.1132)(J.A.1584).

Christianity"); *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring and dissenting in part) (the Latin cross is a "proselytiz[ing]" Christian symbol).

A Christian cross memorial does not commemorate, and necessarily excludes, the "3,500 Jewish soldiers [who] gave their lives for the United States in World War I." *Buono*, 559 U.S. at 726-27 (Alito, J., concurring). *See* H.R. Res. 15, 68th Cong. at 1-6 (1924) (J.A.2280-97). The Jewish War Veterans organization has challenged war memorial crosses for this very reason. *See Trunk v. City of San Diego*, 629 F.3d 1099, 1105 (9th Cir. 2011); *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988).

In the 1924 Congressional debate over grave markers for American Soldiers in Europe, Hon. Emanuel Celler testified: "You have those 1,600 Jewish dead, and if you put something other than the double triangle on their graves, . . . there might arise in the hearts of the mothers and fathers of those boys some conflicting emotions." The Chairman of the Committee on Military Affairs asked, "Why would it not be fitting and proper to have just a nice marble slab, without either the cross or this Star of David or anything else on it?" Mr. Celler responded: "I do not think there would be any objection if everybody would be treated alike."[2]

The Executive Director of the Jewish Welfare Board testified that the cross did not honor Jewish soldiers and that they too would prefer a plain slab to

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[2] (J.A.2282-83).

represent *all* soldiers.[3] He also clarified that there were in excess of 2,500 Jewish war dead, not 1,600, and that many Jewish graves were erroneously, and offensively, marked with crosses.[4]

It is undisputed that the Bladensburg Cross does not honor non-Christian veterans.[5] The Legion admitted that this Cross was never intended to commemorate Jewish soldiers,[6] despite substantial Jewish communities in Maryland and D.C.[7] In 1985, the Commission officially "Rededicated" the Cross to *all* veterans, spending $100,000 on extensive renovations, yet never attempted to make the monument inclusive "so that it appropriately recognized the religious diversity of the American soldiers who gave their lives" in service. *Buono*, 559 U.S. at 726-27 (Alito, J., concurring). On the contrary, the Commission emphasized the Cross's exclusive Christian message by inviting a Catholic priest to deliver prayers at the rededication ceremony.[8]

In addition to disregarding Jewish soldiers, Humanist and atheist military groups, as well as other non-Christian organizations, filed declarations and

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[3] (J.A.2289-90).

[4] (J.A.2289).

[5] (Pet.App.28a)(J.A.213)(J.A.300)(J.A.305)(J.A.1044-46)(J.A.1082-84)(J.A.1437-38)(J.A.2280-97)(J.A.3261)(J.A.3269).

[6] (Oral Arg. 23:05-23:37)(J.A.164)(J.A.771).

[7] (J.A.212).

[8] (J.A.362-65).

amicus briefs contending that the Bladensburg Cross does not represent them or their members.[9]

For instance, the president of the Military Religious Freedom Foundation, which has "clients from all branches of the US military," and represents "a myriad faith and non-faith groups," including "Jewish, Hindu, Sikh, Buddhist, [and] Native American spiritualist," testified that the "Bladensburg Cross does not represent our tens of thousands of MRFF clients."[10]

The Council on American Islamic Relations, the nation's largest Muslim civil rights organization, also submitted a motion opposing the Bladensburg Cross on the grounds that "Christian symbols do not represent Muslim service members."[11]

COUNTERSTATEMENT OF THE CASE

The Commission's statement is neither complete nor accurate. Respondents offer this counterstatement to address its more important omissions and errors.

First, the Commission recites the same bald claim as the Legion, that the "memorial bears the shape of a cross" solely to "evoke the grave markers on the battlefields of Europe." (Pet.5). This is unsupported and indeed *belied* by the record. (Opp.9-11). Again, it is

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[9] (J.A.1044-46)(J.A.1082-84)(J.A.3408-12); *see also* (J.A.3261)(J.A.3269)(4th Cir. Doc. 29-1).

[10] (J.A.1082-83).

[11] (J.A.3411-12).

undisputed that the donors intended to build a "mammoth cross, a likeness of the Cross of Calvary, as described in the Bible."[12] The "Calvary Cross Memorial" committee led fund-raising efforts.[13] The keynote speaker at the Cross's dedication ceremony proclaimed the Cross to be "symbolic of Calvary."[14]

The Commission omits any mention of "Calvary," and of the Cross's famed designer, John Earley, and the Catholic Shrine from which the Cross's design borrowed heavily.[15] This omission is confounding seeing as the Commission was adamant at summary judgment that a reasonable observer would be aware of "Earley's prominence."[16]

Second, the Commission inaccurately contends that it acquired the Cross to "address traffic safety concerns" (Pet.7), neglecting the fact that the government owned the Cross from the outset. The Cross was erected on Town property, with the Town's approval, then taken over by the State Roads Commission for highway expansion, and then transferred to the Commission in 1960 for the sole purpose of "future repair and maintenance."[17] The Commission admitted: "After completing the highway project, the Roads

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[12] (Pet.App.7a)(J.A.1115).

[13] (J.A.1118).

[14] (Pet.App.59a)(J.A.1130-34)(J.A.2508).

[15] (J.A.628)(J.A.2486-87)(J.A.3312-13).

[16] (Doc. 86 at 30).

[17] (Pet.App.7a, 57a-63a)(J.A.78)(J.A.93-94)(J.A.1086)(J.A.1095)(J.A.1393-94)(J.A.1450)(J.A.3219).

Commission determined that there was excess land remaining that was no longer needed at the Memorial."[18]

Third, the Commission states that "[n]o religious ceremony has ever been held" at the Cross. (Pet.15). But the District Court found "evidence supporting [plaintiffs'] assertion that some religious services were held at the Monument." (Pet.App.62a). As the Fourth Circuit noted, "Sunday worship services have at times been held at the Cross." (Pet.App.8a). *See* (J.A.1228).

Moreover, every ceremony held *for* the Cross—including its fundraising drive, dedication, "50th anniversary," and rededication—featured Christian clergy-led prayers.[19] The Commission even invited a Catholic priest to deliver prayers at the Cross's rededication, expressing a desire to "assimilate this relationship again."[20] Since then, the Town and the Legion have co-sponsored annual services at the Cross that regularly include prayers led by Christians.[21]

Lastly, it is undisputed that the Cross is the Town's most prominent monument.[22] The Cross itself has no secular features aside from a small "U.S." star in the center.[23] The Commission stresses that the star

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[18] (Dist. Ct. Doc.86 at 5).

[19] (Pet.App.7a-8a, 23a, 59a)(J.A.362-65)(J.A.1225-32)(J.A.1262-70)(J.A.1350)(J.A.1998)(J.A.2092-96).

[20] (J.A.362).

[21] (Pet.App.8a, 23a, 25a-26a)(J.A.840)(J.A.870-91)(J.A.1282-1343)(J.A.1803-12)(J.A.1847-50).

[22] (Pet.App.24a, 28a)(J.A.37-40)(J.A.1753).

[23] (Pet.App.24a)(J.A.34)(J.A.1098-99).

is the "American Legion" symbol (Pet.6), yet government records refer to it only as a generic "gold star bearing the letters 'U.S.' in red in the center."[24] While "an American flag flies at one side" of the Cross (Pet.6)(J.A.34), neither the star nor the flag negate the Cross's religious meaning, and both only fortify the appearance of government support for this massive Christian symbol. (Pet.App.25a). *See Allegheny*, 492 U.S. at 600; *Books v. City of Elkhart*, 235 F.3d 292, 307 (7th Cir. 2000) ("the placement of the American Eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion . . . and civil government").

REASONS FOR DENYING THE WRIT

There are four reasons to deny certiorari. First, the interlocutory posture makes this case unripe for this Court's review. Second, the Fourth Circuit's ruling is highly fact-specific, allows the Commission to retain the historical aspect of the monument, and does not threaten any other monument. Third, there is no Circuit split. Fourth, there is no conflict with this Court's precedents. Sup. Ct. R. 10.

[24] (J.A.61)(J.A.326)(J.A.2991).

I. The case is unripe for this Court's review.

As discussed in Respondents' Opposition to the Legion's Petition, this case is not ripe for this Court's review, as no final judgment has been rendered and it remains unclear precisely what action the government must take on remand. (Opp.13-14). *See Mount Soledad Memorial Association v. Trunk*, 567 U.S. 944, 945-46 (2012) (Alito, J., concurring in the denial of certiorari).

II. The Fourth Circuit's narrow fact-specific decision neither hinders the government's ability to honor its war dead nor threatens any other monument.

A. Modifying the monument to honor all veterans advances religious liberty and equality.

"'The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion.'" *Allegheny*, 492 U.S. at 593 (citation omitted). *See Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 703 (1994) (recognizing the role of courts in "safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion").

The "individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority." *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985). "When the power, prestige, and financial support of government is placed behind

a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel*, 370 U.S. at 430-31. *See Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part) (recognizing coercive effect of "the permanent erection of a large Latin cross on the roof of city hall").

Contrary to the Commission's argument (Pet.33), the Fourth Circuit's decision "in no way hinder[s] the county's ability to honor its war dead." *Greater Houston Chapter of American Civil Liberties Union v. Eckels*, 589 F. Supp. 222, 234 (S.D. Tex. 1984), *reh'g denied*, 763 F.2d 180 (5th Cir. 1985). "Indeed, there are countless ways that we can and should honor them, but without the imprimatur of state-endorsed religion." *Trunk*, 629 F.3d at 1102. Notably, the county already has a secular World War I memorial at the nearby courthouse, unveiled a week after the Cross's groundbreaking, bearing the same names as those on the Cross's plaque. (Opp.10).[25]

More importantly, the "opinion does not presuppose any particular result," as the court remanded "to explore alternative arrangements that would not offend the Constitution." (Pet.App.31a-32a). Justice Alito sanctioned this approach in *Buono*, 559 U.S. at 726-27 (concurring). He noted that "[o]ne possible solution would have been to supplement the monument on Sunrise Rock so that it appropriately recognized the religious diversity of the American soldiers who gave

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[25] (J.A.206-08)(J.A.295)(J.A.1992).

their lives in the First World War." *Id.* Congress chose instead to transfer the land, a curative measure Justice Alito deemed sufficient because "the new owner is under no obligation to preserve the monument's present design." *Id.* at 728.

The Fourth Circuit's decision likewise does not "deprive the community of a historic landmark" (Pet.33), as it leaves intact the historic pedestal containing the plaque, and even the concrete monument, subject to a slight modification that would honor all veterans. The Commission itself suggested that it might be best to start from scratch, *infra*.

After spending $100,000 on renovations in 1985, the Commission spent an additional $17,000 on routine maintenance, which proved futile.[26] In 2008, the Commission set aside $100,000 for substantial modifications because the Cross is "rapidly deteriorating" with large chunks falling off, even posing a safety hazard.[27]

In 2009, the Commission reported: "There are two cracks that are getting worse which potentially will cause a face of the [Bladensburg] Cross to fall off."[28] In 2010, the Commission sought "Requests for Proposals,"

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[26] (Pet.App.8a, 30a, 63a)(J.A.360)(J.A.1108-10)(J.A.1655)(J.A.1672)(J.A.2480)(J.A.2484).

[27] (Pet.App.8a, 30a, 63a)(J.A.562-64)(J.A.1648-50)(J.A.1660)(J.A.1668)(J.A.1672)(J.A.1697)(J.A.1698)(J.A.2158).

[28] (J.A.1655).

but none were within budget.[29] As an official remarked: "There were definitely some challenges with this procurement, so much so, that we ended up cancelling the solicitation."[30]

A 2010 Commission-funded report referred to the Cross as a "public eyesore seen by hundreds of passing motorists each day."[31]

In 2012, a Commission official proclaimed via email: "Wow. Looks like another big chunk fell off it, so it may come down on its own!!"[32]

In November 2013, another official mused: "So, the Peace Cross is falling down. . . . Making repairs to the structure have not proven sustainable or helpful in the long term. At what point does one stop making repairs, and consider whether it *makes more sense to start from scratch* or not . . . ?"[33]

In 2015, the Commission conducted a "crack survey" proving extensive work is urgently needed if the Cross is to survive.[34] The Commission's designee testified in deposition: "As a matter of fact, the Peace Cross is coming down now."[35]

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[29] (J.A.1625)(J.A.1650-56); *see also* (J.A.569-79)(J.A.617) (J.A.637)(J.A.1617-75)(J.A.1704).

[30] (J.A.1675).

[31] (J.A.1574).

[32] (J.A.1668).

[33] (J.A.1672) (emphasis added).

[34] (J.A.1704)(J.A.2480-2502).

[35] (J.A.2158).

The Commission's *internal* conversations reflecting apathy and even relief about the Cross coming down on its own, *supra*,[36] starkly contrast with its *public* statement that the Fourth Circuit's "decision will necessitate an act of shocking disrespect for the brave souls of Prince George's County." (Pet.33). The Commission fails to explain how a slight alteration to this severely imperiled monument—which may come down on its own[37]—will do anything other than respect *all veterans*, the stated intent of the Commission's rededication in 1985.[38]

The Commission's argument also contradicts its theory of the case that the "shape" is somehow incidental or secondary to the memorial. (Pet.i, 2, 5, 17). Of course, this case is about "*the* Christian symbol."[39] As Judge Wynn observed: "If the Latin cross here at issue is more overtly secular than sectarian, as the Commission and *amici* maintain, then their concern that altering or removing the monument would be 'hostile' to religious beliefs is puzzling."[40] The Commission agreed with Judge Wynn that the Cross does not just have "religious content," but is instead "almost universal[ly]" viewed "as a symbol of the crucifixion of Jesus

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[36] *See also* (J.A.1726) (noting disinterest in nominating the Cross for Maryland preservation funding).

[37] The northern arm is "the most deteriorated and damaged section of the Cross," and both arms exhibit "serious cracks" and spalling. (J.A.2490-91)(J.A.2500)(J.A.1574)(J.A.1586-90)(J.A.2052).

[38] (J.A.362)(J.A.1753).

[39] (Oral Arg. 31:05-31:32).

[40] (Pet.App.95a-96a).

Christ."[41] Judge Wynn surmised, "when one characterizes it as simply having religious content, then those who follow that have got to be feeling that cannot possibly be the case. It is much more than a religious content."[42] The Commission's counsel agreed.[43]

B. The government's Christian cross war memorial co-opts spiritual content for military purposes, offending many Christians.

The Fourth Circuit's decision not only advances religious liberty and equality for non-Christians, but also advances religious freedom for Christians, as many Christians believe the cross's sacred status is denigrated when the government co-opts it as a symbol of war.[44] "Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices." *McCreary*, 545 U.S. at 883 (O'Connor, J., concurring).

The cross carries deeply significant meaning for those of the Christian faith and "acts as a 'short cut from mind to mind' for adherents who draw strength from it." *Doe v. Elmbrook School District*, 687 F.3d 840, 852 (7th Cir. 2012) (en banc) (quoting *West Virginia*

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[41] (Oral Arg. 38:55-40:34).

[42] (Oral Arg. 40:00-40:21).

[43] (Oral Arg. 40:21-40:24).

[44] (Pet.App.21a, 89a-93a)(J.A.188)(J.A.1083)(J.A.1443-45) (Oral Arg. 27:25-33:00, 38:00-41:00).

State Board of Education v. Barnette, 319 U.S. 624, 632 (1943)).

The Fourth Circuit correctly observed that the argument that the Latin cross "symbolizes anything other than Christianity may be deemed offensive to Christians." (Pet.App.21a). Judge Wynn believed it would "infringe on intensely personal and sacred questions of religious meaning and belief." (Pet.App.90a). In response to the Legion's statement that a religious symbol "can also acquire secular significance," Judge Wynn admonished: "I would hope you don't water it down too much."[45] He added: "I don't think the cross has secular meaning. That's just a personal aside but I actually think it's kind of offensive to think that saying a cross is just a secular symbol of something else."[46]

Reverend Brian Adams, pastor of Mount Rainier Christian Church, expressed a similar sentiment in 2012 about the Bladensburg Cross:

> [I]t is the symbol of the son of God dying peacefully. . . . I believe that using the cross as a symbol of what our military did is blasphemy, equivalent to taking the Lord's name in vain, using the cross where God and Christ would not want it to be used. The [Bladensburg] Cross is there as a Christian symbol.[47]

See also Pope Francis: The Cross Is the Gate of Salvation, Vatican Radio (Mar. 12, 2017), http://bit.ly/2hysfbS

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[45] (Oral Arg. 31:16-32:00).

[46] (Oral Arg. 31:35-32:25).

[47] (J.A.1443-45).

("The Christian Cross is not something to hang in the house 'to tie the room together' . . . or an ornament to wear, but a call to that love, with which Jesus sacrificed Himself to save humanity from sin and evil.").

In recognition "that a union of government and religion tends to destroy government and to degrade religion," the Establishment Clause "stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." *Engel*, 370 U.S. at 431-32. James Madison viewed governmental support for religion as "[r]eligious bondage [that] shackles and debilitates the mind and unfits it for every noble enterprize."[48] Thomas Jefferson agreed that governmental religious favoritism "tends only to corrupt the principles of that very Religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it."[49]

C. No other monument is affected by the Fourth Circuit's fact-intensive ruling.

The Fourth Circuit made clear that its "decision is confined to the unique facts at hand." (Pet.App.29a). This Court's precedents indeed require that each

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[48] Letter from James Madison to William Bradford (April 1, 1774), http://bit.ly/2h57Xm5.

[49] Thomas Jefferson, *The Virginia Statute for Religious Freedom* (Jan. 16, 1786), *reprinted in* FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY 94-95 (John J. Patrick ed., 1995).

display be "judged in its unique circumstances." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring). *See McCreary*, 545 U.S. at 867-68. The Commission's argument that the decision threatens other monuments is therefore unavailing. (Pet.33-35). Like the Legion, the Commission failed to identify a single war memorial cross as prominent, both in terms of size and placement, as the Bladensburg Cross. (Opp.32).

The Fourth Circuit specifically distinguished the crosses in Arlington Cemetery—the Canadian Cross of Sacrifice and the Argonne Cross, and a cross commemorating the Mexican Civil War—(Pet.App.29a), as did the Ninth Circuit in *Trunk*. "None of these crosses is a prominent or predominant feature of the cemetery." 629 F.3d at 1114-15. "All three crosses stand among, if not immediately next to, the countless headstones of soldiers buried in Arlington and alongside a large number of other monuments." *Id.*

"Much the same can be said for the Irish Brigade Monument and the monument to the 142nd Pennsylvania Infantry," which "are on equal footing with [numerous] other monuments and do not dominate the landscape." *Id.* at 1124. As Dr. Piehler testified, in rare cases where crosses "have been used on war memorials built outside of national cemeteries," they usually serve as a "distinctive ethnic marker."[60] The Irish

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[60] (J.A.193).

Brigade Monument, for instance, is a Celtic cross bearing the seal of Ireland and an Irish bloodhound.[51]

The centrality and prominence of the Bladensburg Cross distinguishes it from the foregoing crosses. While the Commission argues that the Cross is situated in a "place for 'commemorating and memorializing veterans,' no less than Arlington," (Pet.34), it also insists that the "Cross is situated on a highway median that 'suggests little or nothing of the sacred.'" (Pet.15). Unlike the crosses at Arlington, there are no walkways to the Bladensburg Cross, and due to its placement within a traffic island of a major three-highway intersection, events held at the Cross necessitate police presence to facilitate pedestrian access.[52]

The Commission also argues that "the notion that *more* religious symbolism would have saved the Cross from invalidity" is "absurd." (Pet.35). The Circuits would disagree. *E.g.*, *Skoros v. City of New York*, 437 F.3d 1, 25 (2d Cir. 2006) ("[W]hen menorahs or stars and crescents are displayed, their religious significance is appropriately neutralized by myriad accompanying symbols of other winter holidays having nonreligious as well as religious origins."). In any event, it would be imprudent for anyone to challenge the Arlington crosses in light of the numerous statements from multiple Circuits indicating that they do not offend the Constitution.

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[51] (J.A.193)(J.A.2254).

[52] (Pet.App.25a)(J.A.37)(J.A.140)(J.A.1155)(J.A.1583)(J.A.1372)(J.A.2485).

The Commission only identifies two other crosses within the Fourth Circuit. (Pet.34). The cross in Towson, Maryland, however, is one-third the size of Bladensburg Cross and does not tower over a busy highway intersection.[53] The small Cape Henry Cross was originally installed in 1607 by English colonists and now stands in a museum-like setting, no larger than the numerous exhibits and monuments in historic Jamestown and Yorktown. *See Trunk*, 629 F.3d at 1115 n.16 (distinguishing Cape Henry Cross).

The Commission goes on to cite Judge Bea's dissent, stating that he gave "hundreds" of *other* examples (Pet.34), but in fact, cited the same Arlington and Gettysburg crosses discussed above, one cross in New Mexico, two in California, the Father Junipero Serra statue (*one* of *one hundred* statues in National Statuary Hall), and lastly, "114 Civil War monuments." *Trunk v. City of San Diego*, 660 F.3d 1091, 1099-100 (9th Cir. 2011) (Bea, J., dissenting from denial of rehearing en banc). "Only 114" of "3,500 [Civil War] monuments include some kind of cross, however, and the cross is generally 'subordinated to symbols that emphasize American nationalism and sacrifice of the fallen.'" *Trunk*, 629 F.3d at 1113.

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[53] (J.A.2685).

III. There is no Circuit split.

A. The Circuits agree that a Christian cross does not serve as a *secular* symbol of commemoration.

Every federal case involving the constitutionality of a government cross monument displayed as a memorial found the cross unconstitutional, including decisions by the Fourth, Seventh, Ninth, and Tenth Circuits. (Opp.15-19). *See Trunk*, 629 F.3d 1099; *American Atheists, Inc. v. Duncan*, 616 F.3d 1145 (10th Cir. 2010); *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996); *Ellis v. La Mesa*, 990 F.2d 1518 (9th Cir. 1993); *Gonzales v. North Township Lake County*, 4 F.3d 1412 (7th Cir. 1993); *American Humanist Association v. Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014); *Jewish War Veterans*, 695 F. Supp. 3; *Eckels*, 589 F. Supp. 222; *see also Cabral v. City of Evansville*, 958 F. Supp. 2d 1018 (S.D. Ind. 2013), *dismissed on other grounds*, 759 F.3d 639 (7th Cir. 2014) (crosses in veterans park); *Kondrat'yev v. City of Pensacola*, 2017 U.S. Dist. LEXIS 203588, at *21 n.4 (N.D. Fla. June 19, 2017) *appeal pending* No. 17-13025 (11th Cir. 2018) (finding the city's argument that "the Bayview Cross is a war memorial" irrelevant in light of the "numerous appellate and district court cases ordering the removal of war memorial crosses").

Again, there are *thirty* federal cases holding cross displays unconstitutional in a wide range of contexts, including cases by the Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits, and only *three* outliers.

(Opp.15-20). *See American Atheists, Inc. v. Port Authority*, 760 F.3d 227 (2d Cir. 2014); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008); *Murray v. Austin*, 947 F.2d 147 (5th Cir. 1991). And these outliers are attributable to highly unique facts rather than legal disagreement. (Opp.19-20). Yet the Commission relies on these outliers, as well as *Briggs v. Mississippi*, 331 F.3d 499, 503-06 (5th Cir. 2003) (Pet.25-28), which the Legion omitted due to its obvious irrelevance. *Briggs* involved the Confederate flag, not the Latin cross, and did not concern "any religious symbolism." *Id.*

B. The Commission misconstrues the Circuits' decisions to manufacture a split.

1. The Second and Fifth Circuits never ruled on the constitutionality of a war memorial cross.

The Commission's argument that the "circuits have sharply split as to the permissibility of ever using the cross as a commemorative symbol" is meritless. (Pet.22). The Circuits are in complete agreement that a "memorial cross" only "memorializes the death of a *Christian*." *Duncan*, 616 F.3d at 1161, sending "a strong message of endorsement and exclusion." *Trunk*, 629 F.3d at 1124-25. There is no contrary authority. *See also Allegheny*, 492 U.S. at 615 n.61 (noting that a "war memorial containing crosses and a Star of David unconstitutionally favored Christianity and Judaism") (citing *Eckels*, 589 F. Supp. 222). The Commission nonetheless claims a "split" between the "Ninth, Tenth,

and Fourth Circuits," and the "Second and Fifth Circuits." (Pet.28). This "split" is illusory.

The Commission states that in *Port Authority*, the Second Circuit upheld "the commemorative use of the Latin cross." (Pet.28). But the Second Circuit did not say anything about a *commemorative* use of the cross. It ruled that "a reasonable observer would view the primary effect of displaying The Cross at Ground Zero, amid hundreds of other (mostly secular) artifacts, to be ensuring historical completeness, not promoting religion." 760 F.3d at 243. The court relied on *Lynch*'s analogy that an "exhibition of literally hundreds of religious paintings in governmentally supported museums" does not endorse religion. 465 U.S. at 683.

The Bladensburg Cross is not a naturally occurring artifact displayed in a museum, but rather, a massive "Calvary Cross," installed in isolation on a traffic island of a busy intersection where the government's imprimatur is unmistakable. (Pet.App.94a).

The Commission then contends that the Fifth Circuit in *Murray* held "that a 'Christian cross' . . . may simply serve to commemorate a municipality's 'unique role and history.'" (Pet.29). What the Fifth Circuit actually held was very different: "Taken as a whole, *the insignia* has the principal or primary effect of identifying city activity and property and promoting Austin's unique role and history." 947 F.2d at 155 (emphasis added). It said nothing about *commemoration*. Moreover, the court deemed it significant that "the cross in Austin's insignia occupies a displacement area of only

.4%-.12%." *Id.* at 157 n.11. This distinguished it from the Seventh and Tenth Circuits' cases finding prominent crosses in seals unconstitutional. *Id.* at 156-57. (Opp.20).

The Commission also downplays the overwhelming authority against it by focusing only on the Fourth, Ninth, and Tenth Circuits' cross cases, while ignoring the Third, Seventh, and Eleventh Circuits' cases finding crosses unconstitutional. *E.g.*, *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (privately-donated cross in state park); *Gonzales*, 4 F.3d 1412 (war memorial); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991) (cross in insignia); *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (lighted cross as part of holiday display); *Gilfillan v. Philadelphia*, 637 F.2d 924 (3d Cir. 1980) (cross on platform funded by the government). In *Harris*, for instance, the Seventh Circuit ruled that the cross "transcend[s] mere commemoration" and promotes only the "Christian faith." 927 F.2d at 1415.

2. The Fourth, Ninth, and Tenth Circuits' decisions do not impose a *per se* prohibition against crosses.

In addition to misrepresenting the Second and Fifth Circuits' decisions, the Commission also misrepresents the Fourth, Ninth, and Tenth Circuits' rulings to forge a "split." It contends that the Ninth Circuit has been applying "a virtual *per se* prohibition on cross-shaped monuments," first citing *Eugene*, 93 F.3d 617.

Although the analysis is short, Judge O'Scannlain evaluated the history, context, and setting of the war memorial cross and still found that it violated the Establishment Clause. *Id.* at 625-26 (concurring). He reasoned that the "City's use of a cross to memorialize the war dead may lead observers to believe that the City has chosen to honor only Christian veterans." *Id.*

Far from adopting a categorical approach, the Ninth Circuit in *Trunk* understood that "[s]ecular elements, coupled with the history and physical setting of a monument or display, can—but do not always—transform sectarian symbols" into non-endorsing displays. 629 F.3d at 1117. The Ninth Circuit then conducted an extensive analysis, looking to the "fine-grained, factually specific features of the Memorial, including the meaning or meanings of the Latin cross at the Memorial's center, the Memorial's history, its secularizing elements, its physical setting, and the way the Memorial is used." *Id.* at 1110 (citing *Van Orden v. Perry*, 545 U.S. 677, 700-02 (2005); *Allegheny*, 492 U.S. at 598-602). Taking all of these factors into account, *id.* at 1105-25, the court concluded that "the Memorial today remains a predominantly religious symbol." *Id.* at 1110.

The Ninth Circuit began its analysis by acknowledging that the "principle that the cross represents Christianity is not an absolute one." *Id.* at 1111. It then devoted *sixteen* paragraphs to the use of crosses in war memorials and found that nothing supported the position that the Latin cross possesses "an

ancillary meaning as a secular or non-sectarian war memorial." *Id.* at 1116.

The court did not stop there: "Our conclusion that the Latin cross is a Christian religious symbol of remembrance or memorialization does not, of course, end the matter." *Id.* at 1117. But when looking to the cross's history, it found that, just as here, the cross has a "long history of religious use and symbolism that is inextricably intertwined with its commemorative message." *Id.* at 1118. (Pet.App.7a-8a, 23a). Turning to the physical setting, the court found that the "Cross physically dominates the site." *Id.* at 1122-23. And its "central position" among later-added secular displays intensified the cross's "sectarian message." *Id.* at 1124.

Inexplicably, the Commission asserts that the "Tenth Circuit has taken a *similarly categorical approach*," citing *Duncan* yet ignoring *Weinbaum*. (Pet.24) (emphasis added). But in *Duncan*, the Tenth Circuit, like the Ninth Circuit, engaged in a highly detailed analysis of the crosses' purpose, context, history, and secularizing features. 616 F.3d at 1159-64. The court recognized that "[c]ontext can determine the permissibility of displays of religious symbols on public property." *Id.* at 1159 (citing *Allegheny*, 492 U.S. at 598; *Weinbaum*, 541 F.3d at 1035). After evaluating their entire context and history, the court concluded that neither "sufficiently diminish[es] the crosses's message of government's endorsement of Christianity." *Id.* at 1164.

The Commission's portrayal of the Fourth Circuit's decision as a categorical approach is equally flawed (Pet.25). Again, the Fourth Circuit employed a detailed fifteen-paragraph analysis consisting of "the entire context and history of the Cross, spanning from its origin to the present," including its context and meaning, factual background and history, appearance, and physical setting. (Pet.App.28a); *see* (Pet.App.18a-29a). (Opp.21-22, 26-32). It found that these "factors collectively weigh in favor of concluding that the Cross endorses Christianity—not only above all other faiths, but also to their exclusion." (Pet.App.28a).

C. The Circuits do not disagree on what knowledge to attribute to the reasonable observer.

Like the Legion, the Commission attempts to manufacture a split by arguing that "the Tenth and the Fourth Circuits understand the reasonable observer as an ordinary 'passerby' who may fail to notice secularizing details that are not plainly visible." (Pet.29). But instead, both Circuits found that the outcome would not be different even if the reasonable observer could read the detailed plaques on the respective cross displays. (Opp.21-22).

The Tenth Circuit in *Duncan* "agree[d] that a reasonable observer would recognize these memorial crosses as symbols of death," but disagreed "that this nullifies their religious sectarian content." 616 F.3d at 1160-61. The Fourth Circuit similarly imputed

knowledge upon the reasonable observer that would be unknown to an "ordinary 'passerby' " including the fact the Cross was originally "dedicated to 49 World War I veterans." (Pet.App.28a) (Opp.22).

More importantly, the Third, Sixth, and Eleventh Circuits—those that the Commission claims are in conflict with the Fourth and Tenth (Pet.29-30)—agree with the Fourth and Tenth Circuits that size, prominence, and visibility are overriding considerations in the reasonable observer analysis. *E.g.*, *King v. Richmond County*, 331 F.3d 1271, 1285 (11th Cir. 2003) ("The caselaw shows that exclusively religious symbols, such as a cross, will almost always render a governmental seal unconstitutional, no matter how small the religious symbol is. . . . Size and placement are, however, factors to consider in the overall effect-prong analysis."); *ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 637 (6th Cir. 2005) (upholding Ten Commandments because it was displayed no "more prominently than the other items in the display"); *Adland v. Russ*, 307 F.3d 471, 486 (6th Cir. 2002) (finding display unconstitutional due to "its prominent placement"); *Modrovich v. Allegheny County*, 385 F.3d 397, 408 (3d Cir. 2004) (upholding display because it was "no larger than" the plaque and the text could not be "viewed from across the street"); *Robinson v. City of Edmond*, 68 F.3d 1226, 1232 n.11 (10th Cir. 1995) ("the visibility of the cross was significant"); *see also St. Charles*, 794 F.2d at 267 (the cross was "an overpowering feature"); *Gonzales*, 4 F.3d at 1414 (the cross was in a "busy intersection . . . [and] visible to virtually anyone").

D. The Circuits do not disagree on the relevance of longevity and history in cross cases.

The Commission's final "split" argument pertains to *Van Orden*. It maintains that Circuits are divided "as to whether to accord any weight to the factor Justice Breyer deemed 'determinative' in *Van Orden*—that is, that a display has stood for decades without facing legal challenge." (Pet.31).

This argument rests on an incomplete account of Justice Breyer's concurrence. Justice Breyer only considered the lack of legal challenges relevant to a "borderline case." 545 U.S. at 700-03. He deemed the Texas display a "borderline" case because the Ten Commandments have a dual secular meaning tied to our nation's foundation of lawmaking, and that secular meaning predominated when displayed inline with numerous equal-sized, similarly-themed secular monuments. *Id.* And it was not just the absence of any legal challenge, but the fact that the display had not been *used* in a religious manner, there was no religious motive on the part of the private donor, and there was no indication that the delay was "due to a climate of intimidation." *Id.* (Opp.32-35).

To be sure, this Court has not applied Justice Breyer's "borderline case" rationale to any other religious display, let alone to a massive Latin cross that dominates its surroundings. This Court has instead held that "no one acquires a vested or protected right

in violation of the Constitution by long use." *Walz v. Tax Commission*, 397 U.S. 664, 678 (1970).

The Commission declares that the "Ninth and Fourth Circuits have openly rejected this portion of Justice Breyer's controlling concurrence." (Pet.31). Yet the Ninth Circuit in *Card v. City of Everett* upheld a Ten Commandments monument under *Van Orden* relying heavily upon the lack of legal complaints. 520 F.3d 1009, 1021 (9th Cir. 2008).

Both the Ninth Circuit in *Trunk*, and the Fourth Circuit below gave this portion of Justice Breyer's concurrence considerable weight. Both Circuits simply found that, unlike in *Van Orden* and other Ten Commandments cases (Pet.31-32), a climate of intimidation explained the lack of earlier challenges to the respective massive Christian cross war memorials. *See Trunk*, 629 F.3d at 1122 (observing that "La Jolla's anti-Semitic history" explained the "lack of complaint").

The Fourth Circuit accurately observed: "[A] person who dared bring a challenge to the Cross for much of those 90 years would have faced possible rebuke. For example, atheists were forbidden from holding public office [in Maryland] until the Supreme Court's intervention in the 1960's." (Pet.App.23a-24a). It added that the Maryland "constitution still contains the offending provision." (Pet.App.24a).

Dr. Piehler further testified that the Bladensburg Cross was erected in an era and region where the cross was "appropriated by the Ku Klux Klan as a sectarian

symbol designed to intimidate Jews, Roman Catholics, and African Americans."[54] The year the Cross was dedicated, the Klan marched from "the peace cross at Bladensburg to the fiery cross at Lanham."[55] Klansmen also conducted a full "Ku Klux Klan" funeral less than a mile away from the unfinished Cross in 1924.[56] *See generally Virginia v. Black*, 538 U.S. 343, 393 (2003) (Thomas, J., dissenting) (discussing the intimidating nature of cross burnings in neighboring Virginia in the 1920s).

"A number of Klansmen were members of the American Legion during this era."[57] Tellingly, "[n]o rabbi or Jewish leader took part in the dedication of the [Bladensburg] Cross despite the close proximity" to "substantial Jewish communities."[58] "For most Jews, especially observant Jews, it would be surprising if they did not view the Bladensburg Peace Cross as an overtly hostile Christian symbol."[59]

Regrettably, a strong climate of intimidation still persists today, as evidenced by a mere sample of threats and vitriol directed at plaintiffs and their counsel for bringing this case.[60] *See also* Hemant Mehta,

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[54] (J.A.188)(J.A.211-13)(J.A.1241-48).

[55] (J.A.1245)(J.A.212).

[56] (J.A.1242)(J.A.211).

[57] (J.A.212).

[58] (J.A.212).

[59] (J.A.213).

[60] (J.A.1427-30)(J.A.1388-93)(J.A.1404)(J.A.1414). For security reasons, death threats against counsel were reported to the police and not documented on the record.

Christians Are Harassing the Atheist Lawyer Who Won the Pensacola Cross Case, PATHEOS (June 21, 2017), https://perma.cc/6KD6-LLYR (discussing threats against Respondents' counsel, Monica L. Miller, in similar cross case).

If anything, the absence of prior lawsuits is evidence that the community perceives the "town's most prominent symbol" (J.A.1753)—a 40-foot-tall Christian cross government-designated war memorial towering over the county's busiest intersection—as the government placing "Christianity above other faiths, views being American and Christian as one in the same, or both." (Pet.App.31a). The risk of "social ostracism can be powerfully deterrent." *Van Orden*, 545 U.S. at 747 (O'Connor, J., dissenting).

IV. The Fourth Circuit reached the correct result in accordance with this Court's precedents.

"The First Amendment mandates government neutrality between religion and religion, and between religion and non-religion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The "principle of neutrality has provided a good sense of direction" to courts, and a necessary one, because it "responds to one of the major concerns that prompted adoption of the Religion Clauses." *McCreary*, 545 U.S. at 875-76. The Founders "knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of

approval." *Engel*, 370 U.S. at 429. They knew "from bitter personal experience," that "whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs." *Id.* at 431. That same "history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith." *Id.*

To preserve the religious neutrality "clearly manifested in the history and logic of the Establishment Clause," *Larson*, 456 U.S. at 246, this Court has agreed "upon the relevant constitutional principles: the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." *Allegheny*, 492 U.S. at 597. *See Buono*, 559 U.S. at 721 (plurality) (reiterating the importance of "context" and "consequences" in religious display analysis).

This context-driven approach produces consistent results. A potent religious symbol that dominates its surroundings is more likely to impermissibly align the government with religion, *Engel*, 370 U.S. at 429, than religious content integrated into a larger secular display. *Compare McCreary*, 545 U.S. at 881 (Ten Commandments held unconstitutional where it was initially installed on its own and its religious meaning was underscored at dedication ceremony), *Allegheny*, 492 U.S. at 598-99 (crèche in courthouse held unconstitutional because of its centrality and prominence), *and*

Stone v. Graham, 449 U.S. 39, 42 (1980) (Ten Commandments held unconstitutional in public school context), *with Van Orden*, 545 U.S. at 700-02 (Breyer, J., concurring) (6-foot-tall Ten Commandments upheld where it was added to an array of 16 equal-sized monuments and 21 historical markers), *Allegheny*, 492 U.S. at 616-17 (menorah upheld because it was dwarfed by adjacent Christmas tree and not as religiously symbolic as a crèche or cross), *and Lynch*, 465 U.S. at 671 (crèche in private park upheld because it was dominated by secular holiday symbols).

Importantly, in *Allegheny*, Justice Kennedy had no "doubt" that the Establishment "Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall." 492 U.S. at 661 (concurring and dissenting in part). He explained that "such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.* (citations omitted).

The Fourth Circuit's decision harmonizes with the foregoing precedents. As the court found, "the Commission is displaying the hallmark symbol of Christianity in a manner that dominates its surroundings and not only overwhelms all other monuments at the park, but also excludes all other religious tenets." (Pet.App.31a). The display "aggrandizes the Latin cross in a manner that says to any reasonable observer that the Commission either places Christianity above other faiths, views being American and Christian as one in the

same, or both." (Pet.App.31a). The Commission failed to show otherwise, *infra*.

A. There is no conflict with *Lynch*.

The Commission relies on *Lynch* for the notion that "passive displays" may "constitutionally employ religious symbols." (Pet.3). This 40-foot-tall Christian cross does not simply "employ religious symbols." It *is a* religious symbol, and *the* Christian symbol.

In *Lynch*, the temporary crèche placed in a private park was *de minimis* in a display that included "among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that reads 'SEASONS GREETINGS.'" 465 U.S. at 671. The Court found that, viewed with the rest of the conspicuously commercial display, the inclusion of a small nativity did not "taint" the city's exhibit but merely represented a symbol of a secularized "National Holiday." *Id.* at 681-82, 686.

Conversely, in *Allegheny*, the crèche was featured in a courthouse lobby, somewhat removed from secular holiday symbols exhibited elsewhere in the building. 492 U.S. at 598. The Court held it unconstitutional because "unlike in *Lynch*, nothing in the context . . . detracts from the crèche's religious message." *Id.* By "permitting the 'display of the crèche in this particular physical setting,'" the Court found, "the county sends

an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message." *Id.* at 600. The Court explained: "No viewer could reasonably think that it occupies this location without the support and approval of the government." *Id.* at 599.

No reasonable observer could reasonably think that the 40-foot-tall Bladensburg Cross, standing alone in a traffic island, "occupies this location without the support and approval of the government" either. *Id.* This is especially so considering that placing a sign, memorial, or other property within state highway right-of-ways is prohibited by the Maryland State Highway Administration, 23 CFR § 710.403(a).

Additionally, because this monolithic Christian cross is not a small symbol of a secularized holiday, but the *preeminent* symbol of Christianity, and because it is "viewed year-round," the Cross "brings together church and state in a manner that suggests their alliance . . . even more ardently than the unconstitutional crèche display[] in . . . *Allegheny*." *Harris*, 927 F.2d at 1412. *See also Friedman v. Board of County Commissioners*, 781 F.2d 777, 782 (10th Cir. 1985) (en banc) ("This [cross] is not like the crèche display upheld in *Lynch*."); *Gonzales*, 4 F.3d at 1423 (the cross was "not seasonally displayed in conjunction with other holiday symbols").

In *St. Charles*, Judge Posner, writing for the Seventh Circuit, distinguished *Lynch*'s crèche from an 18-foot cross bar lit up to form a Latin cross as part of a

city's multifaceted holiday display. 794 F.2d at 270-72. The "cross unmistakably signifies Christianity" whereas the crèche is a "mixed case." *Id.* The court reasoned, "Christmas is a national holiday, celebrated by nonobservant Christians and many non-Christians." *Id.* But "the Latin cross has not lost its Christian identity." *Id.* The Tenth Circuit agreed that "[u]nlike Christmas," there is no evidence "that the cross has been widely embraced by non-Christians as a secular symbol of death." *Duncan*, 616 F.3d at 1161-62.

B. There is no conflict with *Buono*.

According to the Commission, the Fourth Circuit's decision "flouts this Court's directive" in "*Buono*" that the "Establishment Clause 'does not require eradication of all religious symbols in the public realm.'" (Pet.12). Again, *Buono* did not make any such "directive." (Opp.36-38). The plurality warned litigants that "this case is ill suited for announcing categorical rules," and the Court was not "making sweeping pronouncements." 559 U.S. at 722.

Of course, merely because this Court stated, in passing, that the Establishment Clause does not require the eradication of *all* religious symbols does not thereby mean, as the Commission contends, that *all* religious symbols are *allowed*. To the contrary, in *Buono*, Justice Kennedy reaffirmed his statement in *Allegheny*: "'[T]he [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an

obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.'" 559 U.S. at 715 (quoting 492 U.S. at 661).

And in *Allegheny*, Justice Kennedy cited three cases to support this proposition, *Freidman*, involving a "Latin cross on official county seal," and *Rabun* and *Eugene*, both involving a "cross erected in public park." 492 U.S. at 661 (citing *Friedman*, 781 F.2d 777; *Rabun*, 698 F.2d 1098; *Lowe v. Eugene*, 254 Or. 518 (1969)). In *Buono*, Justice Kennedy contrasted these three examples with the Mojave cross, noting that the "[p]lacement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed." 559 U.S. at 715.

Justice Alito agreed that the absence of *government imprimatur* was critical. 559 U.S. at 724-25 (concurring). He explained that "in this part of the country . . . boundaries between Government and private land are often not marked." *Id.* Private citizens "took it upon themselves to place their monument on that spot, *apparently without obtaining approval* from any federal officials, and this use of federal land seems to have gone largely unnoticed for many years, in all likelihood due to the spot's *remote and rugged location*." *Id.* (emphasis added). Justice Alito noted that it would be different if a cross were constructed as "an official World War I memorial on the National Mall." *Id.* at 728.

The Bladensburg Cross was installed on Town property, with the Town's approval and involvement, in

the middle of a highway intersection.[61] Local, state, and federal officials actively participated in the Cross's groundbreaking and dedication ceremonies.[62] Indeed, "major state and county government officials" have been actively involved in nearly every event held at the Cross since its groundbreaking.[63]

And unlike in *Buono*, 559 U.S. at 715, this Cross was emplaced because of its religious meaning. The intent was to build a "mammoth cross, a likeness of the Cross of Calvary, as described in the Bible."[64] The Cross's Christian message was emphasized at its dedication ceremony, both by the keynote address proclaiming it to be "symbolic of Calvary," and by the multiple prayers led by Christian clergy.[65]

The Commission relies heavily on *Buono*, 559 U.S. at 720-21, to support its position that the Bladensburg Cross does not endorse Christianity. (Pet.13). But the plurality was referring to Congress's land transfer statute, and explained that courts "do not inquire into 'reasonable observer' perceptions with respect to objects on private land." *Id.* at 720. The plurality noted that even if the Establishment Clause applied, the

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[61] (Pet.App.7a, 56a-57a)(J.A.78)(J.A.1086)(J.A.1115-18)(J.A.1450)(J.A.1992-94).

[62] (Pet.App.7a, 57a, 59a)(J.A.1120)(J.A.1130-34)(J.A.1222)(J.A.1880)(J.A.1970)(J.A.1991)(J.A.2508).

[63] (J.A.1753)(J.A.137-38)(J.A.356-65)(J.A.383)(J.A.385-420)(J.A.834-40)(J.A.1225-32)(J.A.1266-70)(J.A.2092)(J.A.2095-96)(J.A.1998).

[64] (Pet.App.7a)(J.A.1115-20).

[65] (Pet.App.7a, 59a)(J.A.212)(J.A.1130-34)(J.A.2508).

cross would "be assessed in the context of all relevant factors." *Id.* at 721. One of those overriding factors, not present here, was that "[r]espect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality." *Id.*

The Commission then cites Justice Alito's concurrence to advance its argument that the Latin cross is a "simple marker of *the dead*" and of "*the servicemen*," and that the "shape of the memorial reaffirms that expressly secular meaning." (Pet.14) (emphasis added). Justice Alito, however, did not find that the Latin cross was a marker for *all* servicemen or that it had a secular meaning. Quite the opposite, Justice Alito understood that the cross does *not* reflect "the religious diversity of the American soldiers who gave their lives in the First World War." 559 U.S. at 726-27. He stressed that more "than 3,500 Jewish soldiers gave their lives for the United States," and their graves are marked with a "white Star of David." *Id. See* (J.A.2289-90). Justice Alito simply observed that "a plain unadorned white cross" evoked the "image of the white crosses, row on row" in foreign cemeteries. *Id.* at 725.

Bladensburg Cross is not a "plain unadorned white cross" evoking the image of overseas cemeteries, nor was it intended to. It is a wide, 40-foot-tall, "light brown with a reddish brown border," concrete cross "with decorative bands" to mirror a Catholic Shrine, and was intended to be symbolic of "Calvary."[66] It

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[66] (J.A.1099)(J.A.1134)(J.A.1994)(J.A.1587)(J.A.2486-87).

evokes "a message of aggrandizement and universalization of religion, and not the message of individual memorialization and remembrance that is presented by a field of gravestones." *Trunk*, 629 F.3d at 1116 n.18. (Pet.App.24a-25a).

In *Duncan*, the Tenth Circuit found that "while the cross may be a common symbol used in markers and memorials, there is no evidence that it is widely accepted as a secular symbol." 616 F.3d at 1161-62. The Ninth Circuit agreed that the "Latin cross can, as in Flanders fields, serve as a powerful symbol of death and memorialization, but it remains a sectarian, Christian symbol." *Trunk*, 629 F.3d at 1116. *See* H.R. Res. 15, 68th Cong. at 35 (1924) (J.A.2297) ("a Latin cross for the Christian"). Moreover, the "universal symbol emanating from those foreign wars is *the poppy*, not the cross." *Id.* at 1113 (emphasis added).

As Dr. Piehler testified, "[t]he vast majority of World War I memorials do not make use of religious iconography in their design."[67] Most are secular "statues of doughboys." *Id.* at 1114.[68] "Even during World War I, attempts to use religious iconography were seen as highly controversial."[69] Although overseas cemeteries adopted the Latin Crosses and Stars of David,

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[67] (J.A.190).

[68] (J.A.188-89)(J.A.198-219)(J.A.309).

[69] (J.A.198-206)(J.A.308-309)(J.A.926)(J.A.2280-97).

national cemeteries adopted the inclusive uniform slab marker.[70]

C. There is no conflict with *Van Orden*.

Finally, the Commission cites Justice Breyer's concurrence in *Van Orden* to support its argument that the Cross "serves as a memorial to the fallen rather than an object of religious observance." (Pet.14-15). Again though, Bladensburg Cross has a long history of "religious use and symbolism,"[71] that is "inextricably intertwined with its commemorative message." *Trunk*, 629 F.3d at 1118, 1121. *See also Allegheny*, 492 U.S. at 599. (Opp.4-6, 28-29).

The Commission also avers that twenty years after the Cross was dedicated, "the community began to erect other war memorials around the Peace Cross." (Pet.15). But unlike in *Van Orden*, this 40-foot-tall Christian monolith was proposed and installed in isolation. And it remains "by far the most prominent monument" in the Town, clearly "overshadowing the other monuments" across the road.[72]

Furthermore, the *government* added these smaller displays, not the "community." (Opp.6-7, 11-12, 29). And notably, it did not install any other monument on

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[70] (Pet.App.35a)(J.A.188)(J.A.205)(J.A.305)(J.A.2285).

[71] (Pet.App.7a-8a, 23a, 59a)(J.A.362-65)(J.A.1225-32)(J.A.1267-68) (J.A.1282-1343)(J.A.1350-51)(J.A.1998)(J.A.2092)(J.A.2095-96).

[72] (Pet.App.24a)(J.A.1753).

the central traffic island occupied by the Cross.[73] Thus, a "reasonable observer would find that the [government] had assigned a place of special prominence to the [Cross] in an effort to endorse its religious message." *Green v. Haskell County Board of Commissioners*, 568 F.3d 784, 805 n.14 (10th Cir. 2009).

Ultimately, there is no tension between *Van Orden* with its dual-meaning display and the Fourth Circuit's finding that "[w]hile the Latin cross may generally serve as a symbol of death and memorialization, it only holds value as a symbol of death and resurrection *because* of its affiliation with the crucifixion of Jesus Christ." (Pet.App.20a-21a).

[73] (J.A.33)(J.A.37).

CONCLUSION

Because the petition comes to this Court at an interlocutory stage, the case is not ripe for this Court's review. Nor is there any conflict between the Circuits for the Court to resolve, or any conflict with this Court's precedents.

The petition for writ of certiorari should be denied.

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No. 18-18

IN THE
Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. RESPONDENTS CANNOT DEFEND THE FOURTH CIRCUIT'S DECISION 2

II. THE DECISION BELOW DEEPENS MULTIPLE CIRCUIT SPLITS 6

III. THIS CASE IS PROFOUNDLY IMPORTANT 9

IV. RESPONDENTS' "RIPENESS" ARGUMENT IS MERITLESS 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES:

ACLU of Georgia v. *Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) 8

ACLU of Illinois v. *City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) 8

Am. Atheists, Inc. v. *Davenport*, 637 F.3d 1095 (10th Cir. 2010) 7, 8, 9

Cabral v. *City of Evansville*, 958 F. Supp. 2d 1018 (S.D. Ind. 2013) 8

Gilfillan v. *City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980) 8

Harris v. *City of Zion*, 927 F.2d 1401 (7th Cir. 1991) 8

Lynch v. *Donnelly*, 465 U.S. 668 (1984) 5

Mazurek v. *Armstrong*, 520 U.S. 968 (1997) 11

Mount Soledad Mem'l Ass'n v. *Trunk*, 132 S. Ct. 2535 (2012) 12

Salazar v. *Buono*, 559 U.S. 700 (2010) 5

Town of Greece v. *Galloway*, 134 S. Ct. 1811 (2014) 3

Trunk v. *City of San Diego*, 629 F.3d 1099 (9th Cir. 2011) 7, 9

Trunk v. *City of San Diego*, 2013 WL 6528884 (S.D. Cal. Dec. 12, 2013) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Utah Highway Patrol Ass'n v. *Am. Atheists, Inc.*, 565 U.S. 994 (2011) 9

Van Orden v. *Perry*, 545 U.S. 677 (2005) 2, 6

Weinbaum v. *City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008) 7

STATUTE:

Pub. L. No. 113-291, § 2852 (2014) 12

OTHER AUTHORITY:

Stephen M. Shapiro *et al.*, Supreme Court Practice § 4:18 (10th ed. 2013) 11

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INTRODUCTION

Respondents urge this Court to permit the removal or destruction of a cherished war memorial that has stood without controversy for nearly a century. And far from calling the decision compelling that result a one-off—or contending, as the petition does, that *two* federal circuits would reach the same startling conclusion, *see* Pet. 21-25—respondents assert that "*[e]very*" federal court agrees that "a government cross monument displayed as a memorial" is "unconstitutional." Opp. 20 (emphasis added).

There is thus little dispute about what is at stake in this case. Unless this Court intervenes, a centerpiece of one county's civic life will be mutilated or torn down. *See* Amicus Br. of Maryland Elected Officials 4-5. Memorial crosses across the country—which, by the States' count, number well into the hundreds—will face a similar threat of destruction. Amicus Br. of West Virginia *et al.* 12-27. And the Nations' veterans will need to endure ever-more-determined efforts to "purge from the public sphere" every remembrance of their sacrifice that "in any way partakes of the religious." *Van Orden* v. *Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment).

The Establishment Clause does not compel these senseless results. The Peace Cross easily satisfies the Constitution's call for religious neutrality. The mere inclusion of a cross does not render a monument unconstitutional. And no purpose would be served by respondents' request that the Court wait any longer to say so. The writ should be granted, and the Fourth Circuit's gravely incorrect decision should be reversed.

ARGUMENT

I. RESPONDENTS CANNOT DEFEND THE FOURTH CIRCUIT'S DECISION.

The Fourth Circuit held that the Peace Cross must be removed or destroyed solely because it bears the shape of a cross. The panel could not muster a convincing basis for that implausible conclusion, and, despite filing two briefs spanning 88 pages, neither can respondents.

1. Respondents make remarkably little effort to grapple with the extensive evidence of the Peace Cross's secular meaning. Respondents do not once acknowledge that the memorial contains an explicit dedication honoring the 49 servicemen who perished in World War I. They make only passing mention of the memorial's placement in a park filled with other secular veterans' memorials. *See* Opp. 41. And they make no attempt to rebut the overwhelming evidence, powerfully reinforced by amici, that the Latin cross has long been recognized as a nonsectarian symbol of the World War I dead. *See* Amicus Br. of Veterans of Foreign Wars 7-17; Amicus Br. of Retired Generals and Flag Officers 8-14.

Instead, respondents focus their attention on minutiae plucked misleadingly from the historical record. Respondents assert that the memorial was "[o]riginally called the 'Calvary Cross.'" Opp. 2. It was not: Respondents' support for that claim consists of announcements in two newspapers from 1919 that used that term in passing. Opp. 6 nn.12-13. Most descriptions of the monument prior to and contemporaneous with its construction—let alone in the 93 years since—used entirely nonreligious language. *See, e.g.*, C.A. JA 1128, 1139, 2302-03, 2309.

Respondents further assert that "every ceremony held for the Cross" has included "Christian clergy-led prayers." Opp. 7. What respondents are referring to are the *invocations and benedictions* that precede many Memorial Day and Veterans Day ceremonies at the Peace Cross. *See* Pet. App. 60a-62a. This Court has repeatedly held that solemnizing prayers of this kind are constitutional. *See Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1818-19 (2014). Certainly

they do not tar any nearby structure as a religious establishment.

Respondents also offer an array of outright misstatements. They claim that the Commission did not acquire the cross to "address traffic safety concerns"; the Fourth Circuit expressly found that it did. Pet. App. 19a. They question whether the star in the center of the memorial is the American Legion symbol; respondents' own expert conceded that it is. C.A. JA 287. Respondents repeat the "simply wrong" contention that there is some connection between the Peace Cross and the Ku Klux Klan. Pet. App. 62a n.5. Most egregiously, respondents assert that it is "*undisputed* that the Bladensburg Cross does not honor non-Christian veterans." Opp. 4 (emphasis added). Of course that is not "undisputed": As the record amply demonstrates, for 93 years the community has understood the Peace Cross as a memorial to veterans and the fallen of every faith, C.A. JA 1892, a fact attested to by the diverse amici supporting its preservation here, *see* Amicus Br. of Jewish Coalition for Religious Liberty; Amicus Br. of Islam & Religious Freedom Action Team.

2. Respondents' argument, like the Fourth Circuit's, thus boils down to the contention that a cross-shaped memorial is necessarily unconstitutional, regardless of any amount of secular history or context. In respondents' view, a Latin cross does not "symbolize[] *anything* other than Christianity," and thus "a 'memorial cross'"—any memorial cross—"*only* 'memorializes the death of a Christian.'" Opp. 15, 21 (emphases added; citations omitted).

That sort of categorical hostility to religious symbols finds no footing in this Court's Establishment

Clause jurisprudence. The Court has repeatedly upheld secular monuments that use symbols with religious associations at least as strong as the cross, including the crèche, the menorah, and the Ten Commandments. Pet. 13. Moreover, in *Buono*, a plurality of this Court specifically chastised lower courts for holding—in words that could have been taken from respondents' brief—that a Latin cross is "merely a reaffirmation of Christian beliefs" when used to honor the World War I dead. *Salazar* v. *Buono*, 559 U.S. 700, 721 (2010).

Respondents make token efforts to distinguish these precedents, but their real quarrel is with the precedents themselves. They assert that *Lynch* upheld the use of a crèche because it served as "a symbol of a secularized holiday." Opp. 34-35. No; the Court *rejected* the proposition that the crèche and the Christmas holiday have lost their religious associations, and upheld the display of a symbol "identified with one religious faith" as a permissible way of "taking official note of *** our religious heritage." *Lynch* v. *Donnelly*, 465 U.S. 668, 685-686 (1984).

Respondents claim that *Buono* is distinguishable because the memorial in that case lacked any "government imprimatur." Opp. 37. Again, just the opposite. The *Buono* plurality *emphasized* the substantial role that Congress played in "giving recognition to" and preserving the monument. 559 U.S. at 716, 720-721. Its point was that the memorial did not "set the imprimatur of the state *on a particular creed*" because it was "intended simply to honor our Nation's fallen soldiers." *Id.* at 715 (emphasis added). So too here.

Respondents' efforts to distinguish *Van Orden* are particularly unconvincing. Every consideration on which Justice Breyer relied in upholding the Ten Commandments monument applies with equal if not greater force here. Pet. 15-16. Respondents suggest that *Van Orden* can be distinguished on the grounds that the Peace Cross has "a long history of 'religious use and symbolism'" and the surrounding memorials were added by "the government" at different times and were different sizes. Opp. 41. Those are not distinctions at all. As noted above, the Peace Cross has no "long history of 'religious use and symbolism,'" and in any event the religious associations of the Ten Commandments obviously predate the Latin cross. Furthermore, the surrounding displays on the Texas State Capitol grounds were added by the government, and at different times and in varying sizes, too. *See Van Orden*, 545 U.S. at 702.

II. THE DECISION BELOW DEEPENS MULTIPLE CIRCUIT SPLITS.

Respondents do not dispute that the Fourth Circuit's decision accelerates an alarming trend in the lower courts of declaring cross-shaped memorials categorically unconstitutional. On the contrary, respondents embrace that result: They crow that "*[e]very* federal case involving the constitutionality of a government cross monument displayed as a memorial found the cross unconstitutional." Opp. 20.

In fact, respondents and their allies have not had such total success—yet. Multiple circuits have properly rejected the categorical hostility to cross memorials displayed by the Fourth, Ninth, and Tenth Circuits, along with the misguided interpretations of the Establishment Clause that led to that

conclusion. Pet. 21-32. This Court's intervention is urgently needed to resolve these divisions of authority before more circuits join the abolitionist camp.

1. At least three Circuits—the Ninth, the Tenth, and the Fourth—have adopted a virtual "presumption of unconstitutionality" for cross-shaped memorials. *Am. Atheists, Inc.* v. *Davenport*, 637 F.3d 1095, 1102-03 (Kelly, J., dissenting from denial of rehearing). Respondents suggest that these cases turned on "extensive analysis" of the particulars of each monument. Opp. 24. But the centerpiece of each court's opinion was that the Latin cross, even when used commemoratively, sends an unavoidably religious message. Pet. 27-28. The "extensive analysis" respondents describe consisted of those courts systematically rejecting every secularizing factor as insufficient to overcome that supposedly sectarian meaning. *See Davenport*, 637 F.3d at 1121-24; *Trunk* v. *City of San Diego*, 629 F.3d 1109, 1117-25 (9th Cir. 2011); Pet. App. 22a-29a.[1]

The Second and Fifth Circuits, in contrast, have rejected this unyielding position. Pet. 25-27. Respondents assert that the cross-shaped memorials upheld by those Circuits are distinguishable because they had "the principal or primary effect of" celebrat-

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[1] The Commission agrees with the American Legion that *Weinbaum* v. *City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008), correctly upheld the use of a cross as a historical insignia. *See* Pet. 28 n.3. In *Davenport*, however, the Tenth Circuit limited *Weinbaum* to its unique facts, and held—based on sweeping reasoning cited approvingly by the panel below, *see* Pet. App. 26a—that the cross cannot serve "as a secular symbol of death." 637 F.3d at 1120, 1122.

ing a historical figure and honoring the victims of 9/11. Opp. 22. That is question-begging in the extreme. The cross memorials invalidated by the Fourth, Ninth, and Tenth Circuits had comparable commemorative purposes: to celebrate the war dead or fallen highway troopers. The only difference is that the Second and Fifth Circuits were willing to accept that the cross can predominantly convey a secular commemorative message, while the Fourth, Ninth, and Tenth Circuits were not.[2]

2. The Circuits' split on this question stems in significant part from a further split as to what knowledge to attribute to the "reasonable observer." Pet. 29-30. Whereas some Circuits correctly understand the reasonable observer as an idealized personification of the community, others view him as an imperfectly informed passerby who fails to notice crucial secularizing details. *Id.*; *see Davenport*, 637 F.3d at 1108 (Gorsuch, J., dissenting from denial of rehearing). Respondents' only rejoinder is that all Circuits take into account a monument's "size, prom-

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[2] Contrary to respondents' suggestion, the Third, Seventh, and Eleventh Circuits have not joined their side of the split. Each of the cases respondents cite invalidated crosses used for plainly religious ends, such as celebrating Christmas or Easter, *ACLU of Illinois* v. *City of St. Charles*, 794 F.2d 265, 273 (7th Cir. 1986); *ACLU of Georgia* v. *Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1101 (11th Cir. 1983) (per curiam), supporting a religious denomination, *Harris* v. *City of Zion*, 927 F.2d 1401, 1404 (7th Cir. 1991), or serving as part of a platform for the Pope to say mass, *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 929 (3d Cir. 1980). Several district court cases that respondents cite are similarly distinguishable. *See, e.g.*, *Cabral* v. *City of Evansville*, 958 F. Supp. 2d 1018 (S.D. Ind. 2013) (striking down public display of church crosses).

inence, and visibility." Opp. 27. That is a non-sequitur. The point is that the Fourth and Tenth Circuits are alone in concluding that they may *ignore* critical facts that might escape the notice of a speeding motorist, such as a large plaque explicitly announcing the monument's secular purpose. Pet. App. 24a-26a; *Davenport*, 637 F.3d at 1121.

3. The Circuits' division also rests on a split as to what if any weight to place on a monument's longevity. Pet. 31. Respondents suggest that Circuits have found this factor relevant only in cases involving the Ten Commandments. Opp. 28. That is plainly false, *see* Pet. 31 (giving examples), and in any event would make no sense; there is no special branch of "Ten Commandments Law," *Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of certiorari) (citation omitted)). Nor is there merit to respondents' speculation that the Ninth and Fourth Circuits rejected reliance on a monument's longevity only because they found a "climate of intimidation." Opp. 29. Those courts categorically refused to credit this aspect of Justice Breyer's concurrence on the ground that it was "too simplistic," Pet. App. 23a-24a, and had "no traction," *Trunk*, 629 F.3d at 1122.

III. THIS CASE IS PROFOUNDLY IMPORTANT.

The importance of this case is clear. As numerous amici have affirmed, removing or dismembering the Peace Cross would have profound implications: It would tear out a unifying centerpiece of the local community, Amicus Br. of Maryland Elected Officials 4-5; denigrate the sacrifices of veterans and the fallen, Amicus Br. of Military Order of the Purple

Heart 15-16; and threaten countless similar memorials throughout the Fourth Circuit and the country more broadly, Amicus Br. of West Virginia *et al.* 12-27 (cataloguing numerous similar monuments); Amicus Br. of U.S. Senators and Representatives 8-24 (same).

Respondents claim that the Commission has expressed indifference as to whether the Peace Cross crumbles. Opp. 11-14. That is an absurd mischaracterization. The snippets of documents that respondents quote were part of a committed effort to *ensure the memorial's preservation*. *See* C.A. JA 1571-1616 (expert report designed to establish basis for efforts to "stabilize/preserve/restore the monument"); *id.* at 1620-46 (soliciting proposals to restore monument).

Respondents further suggest that the Fourth Circuit's decision will not threaten similar memorials at Arlington National Cemetery and elsewhere. But respondents do not offer any remotely persuasive distinction that would save these monuments if the Peace Cross falls. The best they can muster is that other monuments might have more "walkways" than the Peace Cross, be further from a "highway intersection," or contain "ethnic markers"—distinctions as flimsy as they come. Opp. 17-19. In the end, respondents simply ask the Court to trust that respondents and similar organizations would find it "imprudent * * * to challenge the Arlington crosses." Opp. 18. That is frigid comfort indeed, given many organizations' determined crusade to uproot cross-shaped memorials throughout the country, no matter how cherished or longstanding. *See* Pet. 21-27; Opp. 20.

IV. RESPONDENTS' "RIPENESS" ARGUMENT IS MERITLESS.

In a last-ditch attempt to avoid review, respondents claim that this case is not "ripe" because the lower courts have not yet issued a remedial order. Opp. 1. To the extent respondents are claiming this Court lacks jurisdiction, their objection is meritless. The Court has "unquestioned jurisdiction" to review decisions before issuance of a remedy. Stephen M. Shapiro *et al.*, Supreme Court Practice § 4:18 (10th ed. 2013).

Nor is there any prudential reason for this Court to wait. The Fourth Circuit's decision is plainly incorrect. And the severe and unacceptable consequences of its holding—including the present threat to similar monuments throughout the Fourth Circuit—will materialize irrespective of the precise shape of the remedy in this case. *Cf. Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (per curiam) (finding interlocutory review and summary reversal proper because "the Court of Appeals' decision [wa]s clearly erroneous" and "created a real threat of [harmful] consequences for * * * six other States in the Ninth Circuit").

Furthermore, there is no prospect that the lower courts will order an acceptable remedy. Respondents have insisted throughout the litigation that the monument must be "remove[d]," "demolish[ed]," or dismembered and converted into "a non-religious slab." C.A. JA 131. The Fourth Circuit proposed the same "arrangements." Pet. App. 31a-32a n.19. Given the Fourth Circuit's categorical objection to the display of a "40-foot tall Latin cross," *id.* at 5a, and its dismissal of the already pervasive indicia of

the monument's secular meaning, *id.* at 20a-29a, it is clear that no lesser remedy would satisfy it. Furthermore, any attempt to transfer the Peace Cross to a private entity would pose exceptional challenges, given the "obvious" and "significant" "public safety risks" inherent in permitting a private entity to maintain an aging monument on a busy highway median. Amicus Br. of State of Maryland 5-6; *see* Opp. 11 (acknowledging safety concerns). Indeed, the Executive Director of the American Humanist Association explained that this case was "very attractive" to the organization precisely because "unlike many recent cross cases, the opponent will have great difficulty selling the land *** because the 40 foot cross is in the median of a public highway." C.A. JA 3046.

The posture of this case is therefore unlike *Trunk*. In *Trunk*, it was "unclear precisely what action the [government would] be required to take," and there was some prospect that the memorial at issue could "'be modified to pass constitutional muster.'" *Mount Soledad Mem'l Ass'n* v. *Trunk*, 132 S. Ct. 2535, 2536 (2012) (statement of Alito, J., respecting denial of certiorari). In retrospect, even that hope was overly optimistic: On remand, the district court concluded that the Ninth Circuit's "deliberate language *** ma[de] it clear that removal of the large, historic cross is the *only* remedy that *** will cure the constitutional violation" it found. *Trunk* v. *City of San Diego*, 2013 WL 6528884, at *1-2 (S.D. Cal. Dec. 12, 2013) (emphasis added). Only the timely enactment of a federal statute directing that the memorial be transferred to a private entity saved it from destruction. Pub. L. No. 113-291, § 2852 (2014).

Here, the Fourth Circuit's language is at least as categorical as the Ninth Circuit's. And it is all the clearer that no half-measure would be likely to address the Fourth Circuit's concerns. Unless this Court intervenes, the Peace Cross, and numerous memorials like it, will be removed from the Nation's landscape, and their honorees erased from the Nation's memory.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 18-18

IN THE
Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. The Constitution does not forbid recognition of Christianity's foundational influence upon American history, law, and culture 2

II. The Fourth Circuit neglected the special significance of the cross for military personnel 10

A. The Fourth Circuit's limited depiction of the crosses at Arlington National Cemetery is misleading 10

B. Military medals demonstrate that the cross is closely associated with the military 12

III. The National Mall is based on a grid of a Latin cross 14

IV. The Court should respect the memory of deceased veterans and the rights and sensibilities of their families and descendants. 15

CONCLUSION. 17

APPENDIX A

Excerpt from *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). 1a

TABLE OF AUTHORITIES

Page

Cases

Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n
874 F.3d 195 (4th Cir. 2017). 10, 11, 15

Church of the Holy Trinity v. United States
143 U.S. 457 (1892). 4

People v. Ruggles
8 Johns. R. 290 (Sup. Ct. N.Y. 1811). 3, 4

Salazar v. Buono
559 U.S. 700 (2010) 17

Wallace v. Jaffree
472 U.S. 38 (1985) 16

Constitutions, Statutes, and Legislative Materials

U.S. Const., amend. I ..... *passim*

14 U.S.C. § 491a 12

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Encyclopedia Britannica, *Croix de Guerre* 13

_____, *Cross: religious symbol* 15

_____, *George Cross*.....13

The History of the Victoria Cross, Historic-UK.com 13

Jacqueline Hucker, *Monuments of the First and Second World Wars*, The Canadian Encyclopedia 11

Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 Ala. L. Rev. 377 (2009) 3

James Kent, *Commentaries on American Law* (Oliver Wendell Holmes, Jr., ed., 1873) 3

Gerhard Kittel, *Theological Dictionary of the New Testament* (1971) 15

John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 Columbia L. Rev. 547 (1993) 3

General Douglas MacArthur, *Farewell Address: Duty, Honor, Country*, U.S. Military Academy, West Point, New York (May 12, 1962) 2, 14

Medals.org.uk, *Kingdom of Norway: King Haakon VII"s Cross of Liberty* 14

_____, *The Russian Federation: Order of St George* 13

_____, *Sweden: Knight of the Grand Cross of the Order of the Sword* 14

George Percy, *Jamestown: 1607, The First Months*, Nationalhumanitiescenter.org.....17

A Piece of Fire Service History: The Maltese cross, Fireengineering.com.....13

The President of Poland, *Orders and decorations*.....14

Red Cross Logo, Logodesignlove.com.....13

Joseph Story, *Commentaries on the Constitution of the United States* (1833).....4, 5

U.S. Dep't of Defense, *Awards for Military Valor*.....12

U.S. Department of Veterans Affairs, National Cemetery Administration, *Available Emblems of Belief for Placement on Government Headstones and Markers*.....10

Robert Werlich, *Russian Orders, Decorations and Medals* (1981), depicted at CollectRussia.com.....13

INTEREST OF AMICUS CURIAE[1]

The Foundation for Moral Law ("the Foundation") is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers.

The Foundation has an interest in this case because it believes that the panel opinion departs from a proper understanding of the Establishment Clause.

SUMMARY OF ARGUMENT

Believing that the Constitution should be interpreted strictly according to its plain meaning as understood by its Framers, the Foundation fully endorses the legal and constitutional arguments of the petitioners. Rather than duplicating those arguments, the Foundation will point out that the Establishment Clause does not forbid recognition of the foundational role of Christianity in our history, laws, and culture; that the Fourth Circuit neglected the special significance of the cross for military personnel as reflected in military cemeteries and medals; and that the design of the National Mall was consciously based on a Latin cross.

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[1] All parties received notice on July 31, 2018 of intent to file this brief and have consented to its filing. No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

General Douglas MacArthur in his Farewell Address at West Point explained succinctly the connection between the military and the cross. "The soldier," he said, "above all other men, is required to practice the greatest act of religious training—sacrifice."[2] The Foundation urges the Court to consider that the memory of the fallen commemorated by the Bladensburg cross deserves our utmost respect. The removal of the symbol of their sacrifice would be a sacrilege.

ARGUMENT

I. The Constitution does not forbid recognition of Christianity's foundational influence upon American history, law, and culture.

Sir William Blackstone (1723-1780), whose *Commentaries on the Laws of England* may have sold more copies in America than in England,[3] recognized that all valid human law must rest upon the Revealed Law, which is "to be found only in the Holy Scriptures,"[4] and on the Law of Nature, which is

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[2] General Douglas MacArthur, *Farewell Address: Duty, Honor, Country*, U.S. Military Academy, West Point, New York (May 12, 1962), https://goo.gl/MC3Nw6

[3] Edmund Burke, *Speech on Conciliation with America* (1775), *quoted in* William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 Vermont L. Rev. 5, 5 (1994).

[4] Sir William Blackstone, *Commentaries on the Laws of England* (Philadelphia: Robert Bell, 1772) Intro. 2:41-42.

"expressly declared so to be by God himself"[5] and which is understandable by human reason.

> Upon these two foundations, the law of nature and the law of revelation depend all human laws; that is to say, no human laws should be suffered to contradict these.[6]

Chancellor James Kent (1763-1847) described his experience reading the fourth volume of Blackstone's *Commentaries* at age 16: "[T]he work inspired me with awe, and I fondly determined to be a lawyer."[7] Kent's four-volume *Commentaries on American Law* earned him the accolade of "the American Blackstone."[8] Like Blackstone, Kent (speaking of the law of nations) recognized that the law "deriv[ed] much of its force and dignity" from "the sanction of Divine revelation."[9] On behalf of the New York Supreme Court of Judicature, then-Chief Justice Kent, upholding a blasphemy conviction, quoted English common-law cases for the proposition that "christianity was parcel of the law, and to cast contumelious reproaches upon it, tended to weaken the foundation of moral obligation, and the efficacy of oaths." The decision further held "that whatever strikes at the root of christianity, tends manifestly to

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[5] *Id.* Intro. 2:42.

[6] *Id.*

[7] Letter from James Kent to Thomas Washington (Oct. 6, 1828), *quoted in* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 Columbia L. Rev. 547, 552 (1993).

[8] Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 Ala. L. Rev. 377, 380 (2009).

[9] 1 James Kent, *Commentaries on American Law* *2 (Oliver Wendell Holmes, Jr., ed., 1873).

the dissolution of civil government." *People v. Ruggles*, 8 Johns. R. 290 (Sup. Ct. N.Y. 1811).

Speaking for a unanimous Court, Justice David Brewer, quoting Chancellor Kent's *Ruggles* decision along with a host of other evidence of America's Christian foundations, concluded that "[t]hese, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892). *See* Appendix A for an extended quotation from the *Holy Trinity* opinion.

Likewise, Supreme Court Justice and Harvard Professor Joseph Story (1779-1845), wrote in his influential *Commentaries on the Constitution of the United States* (1833):

> Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general, if not the universal sentiment was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private right of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

....

> The real object of the First Amendment was not to countenance, much less to advance, Mohammedanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.[10]

Acknowledgement of the formative role of Christianity upon American laws and institutions is entirely consistent with the Establishment Clause of the First Amendment. In 1853, when the constitutionality of the congressional chaplaincy was questioned, the Senate Judiciary Committee undertook an exhaustive study of the background and meaning of the Establishment Clause. The Committee concluded in part:

> The clause speaks of "an establishment of religion." What is meant by that expression? *It referred, without doubt, to that establishment which existed in the mother country, its meaning is to be ascertained by ascertaining what that establishment was. It was the connection with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling*

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[10] 3 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1868, 1871 (1833).

the attendance of those who rejected its communion upon its worship, or religious observances. These three particulars constituted that union of church and state of which our ancestors were so justly jealous, and against which they so wisely and carefully provided.

....

Our fathers were true lovers of liberty, and utterly opposed to any constraint upon the rights of conscience. They intended, by this amendment, to prohibit "an establishment of religion" such as the English church presented, or anything like it. But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy. Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world, and an

> habitual reliance upon His protection of the righteous cause which they commended to His care.[11]

The same year the House Judiciary Committee conducted a similar study and came to the same conclusion.

> What is an establishment of religion? It must have a creed, defining what a man must believe; it must have rites and ordinances, which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rites; it must have tests for the submissive and penalties for the non-conformist. There never was an established religion without all these.
>
> ....
>
> At the adoption of the Constitution, we believe every State—certainly ten of the thirteen—provided as regularly for the support of the Church as for the support of the government: one, Virginia, had the system of tithes. Down to the Revolution, every colony did sustain religion in some form. It was deemed peculiarly proper that the religion of liberty should be upheld by a free people. Had the people, during the Revolution, had a suspicion of any attempt

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[11] Senate Judiciary Committee, S. Rep. No. 32-376, at 1, 4 (1853) (emphasis added).

> to war against Christianity, that Revolution would have been strangled in its cradle. At the time of the adoption of the Constitution and the amendments, the universal sentiment was that Christianity should be encouraged, not any one sect. Any attempt to level and discard all religion would have been viewed with universal indignation.
>
> ....
>
> But we beg leave to rescue ourselves from the imputation of asserting that religion is not needed to the safety of civil society. It must be considered as the foundation on which the whole structure rests. Laws will not have permanence or power without the sanction of religious sentiment—without a firm belief that there is a Power above us that will reward our virtues and punish our vices. In this age there can be no substitute for Christianity; that, in its general principles, is the great conservative element on which we must rely for the purity and permanence of free institutions. That was the religion of the founders of the republic, and they expected it to remain the religion of their descendents.[12]

These statements by Sir William Blackstone, Chancellor Kent, the Senate and House Judiciary

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[12] House Judiciary Committee, *Chaplains in Congress and in the Army and Navy*, H. R. Rep. No. 33-124, at 1, 6, 8-9 (1854).

Committees, Justice Brewer, and others are entirely consistent with the Establishment Clause of the First Amendment. Justice Brewer, the author of the *Holy Trinity* decision, understood that Christianity was not the official religion of the United States. In his 1905 book, *The United States a Christian Nation*, he clarified:

> But in what sense can [the United States] be called a Christian nation? Not in the sense that Christianity is the established religion or the people are compelled in any manner to support it. ... Neither is it Christian in the sense that all its citizens are either in fact or in name Christians. On the contrary, all religions have free scope within its borders. Numbers of our people profess other religions, and many reject all. Nor is it Christian in the sense that a profession of Christianity is a condition of holding office or otherwise engaging in public service, or essential to recognition either politically or socially. In fact, the government as a legal organization is independent of all religions.
>
> Nevertheless, we constantly speak of this republic as a Christian nation—in fact, as the leading Christian nation of the world. The popular use of the term certainly has significance.[13]

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[13] David J. Brewer, *The United States a Christian Nation* 12 (1905).

II. The Fourth Circuit neglected the special significance of the cross for military personnel.

A. The Fourth Circuit's limited depiction of the crosses at Arlington National Cemetery is misleading.

The Fourth Circuit's appendix shows the cross as a small symbol on gravestones in Arlington National Cemetery.[14] Although most of the graves have a simple cross[15] carved into the headstone, the cemetery also contains much larger crosses. These include the Argonne Cross, erected "in memory of our men in France 1917-1918" (13 feet tall), the "Cross of Sacrifice" behind the Tomb of the Unknowns, the Canadian Cross of Sacrifice (24 feet tall), the Spanish-American War Nurses Monument (maltese cross), and others.[16] The panel, perhaps uncomfortable with the idea that its opinion logically would require the removal of prominent crosses at the National Cemetery, struggles to avoid this conclusion. *Am. Humanist Ass'n v. Md.-Nat'l Capital*

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[14] *Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 211 n. 17 (4th Cir. 2017). *See* https://pbs.twimg.com/media/CUa2t63VEAEoIfE.jpg to view the headstone images.

[15] These include Latin, Celtic, Aaronic, Armenian, Episcopal, Greek, Lutheran, Presbyterian, Russian Orthodox, Serbian Orthodox, United Methodist, Christian and Missionary Alliance crosses and others. U.S. Department of Veterans Affairs, National Cemetery Administration, *Available Emblems of Belief for Placement on Government Headstones and Markers*, https://goo.gl/akjTQJ.

[16] James Edward Peters, *Arlington National Cemetery: Shrine to America's Heroes* (2008).

Park & Planning Comm'n, 874 F.3d 195, 211 & nn. 16 & 17 (4th Cir. 2017).

According to the official website of the American Battle Monuments Commission which created and maintains the overseas military cemeteries:

> Each grave site for the World War I and World War II cemeteries is marked by a headstone of pristine white marble. Headstones of those of the Jewish faith are tapered marble shafts surmounted by a Star of David. Stylized marble Latin crosses mark all others.[17]

Although these cemeteries are located overseas, the land is given in perpetuity for the use of the United States Government and is operated by the American Battle Monuments Commission. Accordingly, the Establishment Clause is no less applicable to these cemeteries than to those within the United States.

Nor are crosses unique to American military cemeteries. To promote uniformity in British Commonwealth military cemeteries, the Imperial War Graves Commission (now the Commonwealth War Graves Commission) determined that all but the smallest cemetery would have one prominent cross, to be called the Cross of Sacrifice.[18]

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[17] American Battle Monuments Commission, *History*, https://www.abmc.gov/about-us/history.

[18] Jacqueline Hucker, ***Monuments of the First and Second World Wars***, The Canadian Encyclopedia, https://goo.gl/Kmeg7P

On June 12, 1925 Canadian Prime Minister William Lyon Mackenzie King requested that a Cross of Sacrifice be erected at Arlington National Cemetery in Virginia to memorialize Americans who died in World War I while serving in the Canadian armed forces. President Calvin Coolidge approved the request, and the Cross of Sacrifice was dedicated at Arlington on Armistice Day 1927.[19]

B. Military medals demonstrate that the cross is closely associated with the military.

Except for the Congressional Medal of Honor, the highest award a member of the U.S. Army can receive is the Distinguished Service Cross—a gold cross with an eagle on the front that is given "for extreme gallantry and risk of life in actual combat with an armed enemy force."[20] The Distinguished Service Cross is the equivalent of the United States Air Force Cross, the Navy Cross (for Navy and Marine personnel), and the Coast Guard Cross.[21] The cross emblem recognizes the willingness to risk one's lives to save the lives of others or to advance the military mission. This willingness to sacrifice is commonly set forth in the citation that accompanies the medal. The cross, a fitting symbol of such heroism

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[19] Canadian Cross of Sacrifice - Arlington, VA, Waymarking.com, https://goo.gl/grVbzF

[20] *Distinguished Service Cross Law and Legal Definition*, USLegal.com, https://goo.gl/awjWby

[21] U.S. Dep't of Defense, *Awards for Military Valor*, https://goo.gl/1R5Nh7. A member of the Coast Guard may receive the Navy Cross when operating under Navy command. For the Coast Guard Cross, *see* 14 U.S.C. § 491a.

and self-sacrifice, is used by other selfless organizations like the International Committee of the Red Cross[22] and many local fire departments[23].

The military medals of other countries also display a cross. The British Commonwealth nations award the Victoria Cross[24] and the George Cross.[25] Germany awards the Bundeswehr Cross of Honor for Valor for "[a]n act of gallantry in the face of exceptional danger to life and limb while demonstrating staying power and serenity in order to fulfill the military mission in an ethically sound way."[26] Military medals in Russia were frequently in the shape of crosses (the St. Catherine Medal, the St. Alexander Nevsky medal, the St. George Medal, the St. Vladimir Medal, and others).[27] Cross-shaped medals were eliminated and suppressed by the Communist regime after 1918, but since 1991 the Russian Federation has resumed issuing cross-shaped medals to its military heroes.[28]

France awards its bravest soldiers the Croix de Guerre (Cross of War),[29] Sweden the Grand Cross of

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[22] *Red Cross Logo*, Logodesignlove.com, https://goo.gl/FtsJbP

[23] *A Piece of Fire Service History: The Maltese cross*, Fireengineering.com, https://goo.gl/xm7ojw

[24] *The History of the Victoria Cross*, Historic-UK.com, https://goo.gl/jhy62k

[25] *George Cross*, Britannica.com, https://goo.gl/bkXvjA

[26] *Bundesweher-Cross-of-Honour-for-Valour*, Revolvy.com, https://goo.gl/gwLF6A

[27] Robert Werlich, *Russian Orders, Decorations and Medals* (1981), depicted at CollectRussia.com, https://goo.gl/4cbDcS

[28] *The Russian Federation: Order of St George*, Medals.org.uk, https://goo.gl/TfvXKY

[29] *Croix de Guerre*, Britannica.com, https://goo.gl/UtJQNp

the Order of the Sword,[30] Norway the King Haakon VII Freedom Cross (aka Cross of Liberty),[31] and Poland the Order of the Military Cross and the Cross of Merit with Swords (Gold, Silver, and Bronze).[32] Other military forces throughout the Western world award similar cross-shaped medals.

The reason is self-evident. As General Douglas MacArthur said in his Farewell Address at West Point: "The soldier, above all other men, is required to practice the greatest act of religious training—sacrifice."[33] The military cross appropriately recognizes that the sacrifice of the soldier for others on the battlefield is in some sense a reflection of the sacrifice of Jesus for others on the cross.

III. The National Mall is based on a grid of a Latin cross.

Based primarily on the 1791 design of Major Pierre Charles L'Enfant that was approved by President Washington, the National Mall is built in the shape of a Latin cross. A 1902 Senate Park Commission Report stated:

> Regarding the [Washington] Monument as the center, the Capitol as the base, and the White House as the extremity of

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[30] *Sweden: Knight of the Grand Cross of the Order of the Sword*, Medals.org.uk, https://goo.gl/mZu4TX

[31] *Kingdom of Norway: King Haakon VII's Cross of Liberty*, Medals.org.uk https://goo.gl/K1YYPK

[32] The President of Poland, *Orders and decorations*, https://goo.gl/PexPBk

[33] *Farewell Address*, *supra* note 2.

> one arm of a Latin cross, we have at the head of the composition on the banks of the Potomac a memorial site of the greatest possible dignity, with a second and only less commanding site at the extremity of the second arm.[34]

If Congress can expressly reference the Latin cross as the basis for the plan for the National Mall, the City of Bladensburg can erect a Latin cross as a memorial to American veterans. Or must we now plow under the National Mall?

IV. The Court should respect the memory of deceased veterans and the rights and sensibilities of their families and descendants.

The Fourth Circuit ignored all of the evidence cited above and simply held that the cross is exclusively a Christian symbol and the Latin cross is the preeminent symbol of Christianity. *See Am. Humanist Ass'n*, 874 F.3d at 206-07 (citations omitted).[35]

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[34] Senate Committee on the District of Columbia, S. Rep. No. 57-166 (1902), at 2.

[35] These statements are factually incorrect. Christians at various times and places have used many forms of the cross, including the Celtic cross, the Maltese cross, the Jerusalem cross, the St. Andrews cross, the Crucifix, and many others. *See Cross: religious symbol*, https://www.britannica.com/topic/cross-religious-symbol. Christians are not in agreement as to the shape of the cross upon which Jesus died; 7 Gerhard Kittel, *Theological Dictionary of the New Testament* 572 ("Stauros") (1971).

Utterly missing from the Fourth Circuit's analysis, however, is consideration for the memory of the deceased veterans and the rights and sensibilities of their families and descendants.

A memorial monument, whether a private gravestone or a public memorial, is a work of art protected by the Free Speech Clause and in some instances by the Free Exercise Clause of the First Amendment. Many persons, planning for death, invest careful thought, effort, and expense to design a headstone for themselves or their loved ones. Those plans may include the precise words to be engraved, the type of stone including its shape and dimensions, and the artwork to appear on the stone such as crosses, angels, or floral designs. Many, for religious or other reasons, wish to have a cross on their gravestones. They would consider removal of that cross to be nothing less than grave desecration.

The Court should respect the memory of those for whom this monument was dedicated over 90 years ago as well as the rights and sensibilities of those who planned it, contributed to support it, and dedicated it to their loved ones. Such consideration is utterly absent from the Fourth Circuit's analysis. As

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The Fourth Circuit's flawed reasoning coupled with factual errors leads to the absurd conclusion that if the Bladensburg Cross is replaced with a Celtic cross of similar size, no Establishment Clause problem would arise. As Justice Rehnquist famously observed: "[N]o amount of repetition of historical errors in judicial opinions can make the errors true." *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

this Court has recognized, "[A] Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." *Salazar v. Buono*, 559 U.S. 700, 721 (2010) (plurality opinion).

CONCLUSION

Ironically, the cross, which has inspired Americans since the planting of the Jamestown Cross in 1607,[36] is now the most censored symbol in America.

This Court should grant certiorari and protect the Bladensburg Cross as an exemplar of America's Christian heritage and a memorial to the Prince George's County soldiers who died in World War I.

Respectfully submitted,

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[36] George Percy, *Jamestown: 1607, The First Months*, Nationalhumanitiescenter.org, https://goo.gl/xXbnC7

APPENDIX A

Church of the Holy Trinity v. United States
143 U.S. 457, 465-71 (1892)

[N]o purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. The commission to Christopher Columbus, prior to his sail westward, is from "Ferdinand and Isabella, by the grace of God, king and queen of Castile," etc., and recites that "it is hoped that by God's assistance some of the continents and islands in the ocean will be discovered," etc. The first colonial grant, that made to Sir Walter Raleigh in 1584, was from "Elizabeth, by the grace of God, of England, Fraunce and Ireland, queene, defender of the faith," etc.; and the grant authorizing him to enact statutes of the government of the proposed colony provided that "they be not against the true Christian faith nowe professed in the Church of England." The first charter of Virginia, granted by King James I in 1606, after reciting the application of certain parties for a charter, commenced the grant in these words: "We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those parts, to human Civility, and to a settled and quiet

Government; DO, by these our Letters-Patents, graciously accept of, and agree to, their humble and well-intended Desires."

Language of similar import may be found in the subsequent charters of that colony, from the same king, in 1609 and 1611; and the same is true of the various charters granted to the other colonies. In language more or less emphatic is the establishment of the Christian religion declared to be one of the purposes of the grant. The celebrated compact made by the pilgrims in the Mayflower, 1620, recites: "Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first Colony in the northern Parts of Virginia; Do by these Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid."

The fundamental orders of Connecticut, under which a provisional government was instituted in 1638-39, commence with this declaration: "Forasmuch as it hath pleased the Allmighty God by the wise disposition of his diuyne pruidence so to Order and dispose of things that we the Inhabitants and Residents of Windsor, Hartford, and Wethersfield are now cohabiting and dwelling in and vppon the River of Conectecotte and the Lands thereunto adioyneing; And well knowing where a people are gathered togather the word of God requires that to mayntayne the peace and vnion of such a people there should be an orderly and decent

Gouerment established according to God, to order and dispose of the affayres of the people at all seasons as occation shall require; doe therefore assotiate and conioyne our selues to be as one Publike State or Comonwelth; and doe, for our selues and our Successors and such as shall be adioyned to vs att any tyme hereafter, enter into Combination and Confederation togather, to mayntayne and presearue the liberty and purity of the gospell of our Lord Jesus wch we now prfesse, as also the disciplyne of the Churches, wch according to the truth of the said gospell is now practised amongst vs."

In the charter of privileges granted by William Penn to the province of Pennsylvania, in 1701, it is recited: "Because no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship; And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all divine Knowledge, Faith, and Worship, who only doth enlighten the Minds, and persuade and convince the Understandings of People, I do hereby grant and declare," etc.

....

If we examine the constitutions of the various states, we find in them a constant recognition of religious obligations. Every constitution of every one of the 44 states contains language which, either directly or by clear implication, recognizes a profound reverence for religion, and an assumption that its

influence in all human affairs is essential to the well-being of the community. This recognition may be in the preamble, such as is found in the constitution of Illinois, 1870: "We, the people of the state of Illinois, grateful to Almighty God for the civil, political, and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations," etc.

....

Or by article 22 of the constitution of Delaware, (1776,) which required all officers, besides an oath of allegiance, to make and subscribe the following declaration: "I, A. B., do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration."

....

There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons: they are organic utterances; they speak the voice of the entire people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in *Updegraph v. Com.*, 11 Serg. & R. 394, 400, it was decided that, "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania;

... not Christianity with an established church and tithes and spiritual courts, but Christianity with liberty of conscience to all men." ... And in the famous case of *Vidal v. Girard's Ex'rs*, 2 How. 127, 198, this court, while sustaining the will of Mr. Girard, with its provision for the creation of a college into which no minister should be permitted to enter, observed: "It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania."

If we pass beyond these matters to a view of American life, as expressed by its laws, its business, its customs, and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town, and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.

No. 18-18

In The Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR STATE OF MARYLAND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. Private Interests Should be Weighed in the Establishment Clause Analysis When a Private Organization Transfers a Monument to a Governmental Entity in the Interests of Public Safety, but Reserves Rights to the Beneficial Use of the Monument 2

II. States Should be Able to Address the Public Safety Risks Posed by Historically Significant Monuments Without Dooming the Monuments Themselves 5

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

American Atheists, Inc. v. City of Detroit Downtown Development Auth., 567 F.3d 278 (6th Cir. 2009) 6

Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 4

Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) 4

Lynch v. Donnelly, 465 U.S. 668 (1984) 4

Salazar v. Buono, 559 U.S. 700 (2010) 2, 6, 7

Taylor v. Town of Cabot, 178 A.3d 313 (Vt. 2017) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 4

STATUTES

Md. Code Ann., Land Use, Title 15, subtitle 1 (LexisNexis 2017) 1

MISCELLANEOUS

Petition for Writ of Certiorari, *American Legion v. American Humanist Association* (No. 17-1717) 3

INTEREST OF AMICUS CURIAE[1]

Petitioner Maryland-National Capital Park and Planning Commission, an agency created under Maryland law that administers a regional system of parks in two of Maryland's counties,[2] owns and maintains the World War I memorial at issue in this case. Maryland has a longstanding interest in respecting and preserving the reserved property rights of the American Legion in the monument while ensuring that the Peace Cross, an historic memorial that honors members of the military from Prince George's County, Maryland, is properly maintained in a manner that ensures public safety.

SUMMARY OF ARGUMENT

I. Although the Commission owns and maintains the war memorial, a private veterans' organization continues to hold an interest in the site.

When the American Legion transferred the property to the Commission, it reserved the right to continue to use the monument for ceremonies honoring those who fell while serving their country. Those private

[1] The State of Maryland submits this brief pursuant to Supreme Court Rule 37.4. Counsel for amicus timely provided notice to counsel for Petitioner and Respondents American Legion et al. of its intent to file this brief, and on August 1, 2018, provided notice to counsel for Respondents American Humanist Association et al., who confirmed Respondents do not oppose the submission of this brief.

[2] *See* Md. Code Ann., Land Use, Title 15, subtitle 1 (LexisNexis 2017).

beneficial interests should be considered by a court in evaluating whether an Establishment Clause violation occurs when a governmental agency is deeded legal ownership of a monument in order to maintain the monument in a condition that ensures public safety.

II. There is no dispute that the Commission acquired the Peace Cross in order to ensure its maintenance, and the record reveals that the Cross has badly deteriorated over its hundred-year existence. States should have flexibility to take commonsense steps to ensure that aging monuments do not become a public safety risk without dooming the monuments themselves.

In *Salazar v. Buono*, 559 U.S. 700 (2010), this Court recognized the dilemma that a government faces when forced to choose between destroying a monument—thereby communicating disrespect for the monument and those it honors—and violating the Constitution by leaving it in place. This Court should grant the petition to resolve the dilemma recognized in *Salazar*.

ARGUMENT

I. Private Interests Should be Weighed in the Establishment Clause Analysis When a Private Organization Transfers a Monument to a Governmental Entity in the Interests of Public Safety, but Reserves Rights to the Beneficial Use of the Monument.

Although today a Maryland governmental entity owns and maintains the monument so as to preserve

public safety, the original owner, the American Legion, conditioned its transfer of the property by reserving the right to use the site to honor those who died while fighting for our country. Pet. App. 60a. The monument is used only by private parties, and only for secular purposes, and any message the monument conveys is, and always has been, *their* message and not the Commission's. The Cross was built by private parties, and it remained in private hands for 36 years until the Commission acquired the site in 1961 for the sole purpose of ensuring public safety. Pet. App. 59a-60a.

Even after title passed to the Commission, the American Legion continued to enjoy use of the site as if it were the owner. The veterans' organization retained the right to use the land to hold memorial services and ceremonies, Pet. App. 60a, and to be notified if the Cross were to be removed from the Commission's jurisdiction, so that it may "make arrangements for the care and maintenance of the Cross and the surrounding parcel." Pet. App. 60a; J.A. 2529. And the American Legion was a party to the action below—on equal footing with the Commission—which confirms that the American Legion's relationship to the monument is more than mere prior owner.

In its petition, the American Legion describes its regular, uninterrupted use of the site together with the "Bladensburg community," without pointing to any use by the Commission. *See* Petition for Writ of Certiorari, *American Legion v. American Humanist Association* at 7 (No. 17-1717). And for good reason: Although the Commission maintains the monument, "[t]here is no

evidence that the Commission consults with any churches or religious organizations to determine who may access the Memorial for events" or "that the Commission is required to be involved in any church-related activities to maintain the Memorial." Pet. App. 51a (Gregory, C.J., concurring in part and dissenting in part). Indeed, the American Legion understood that when the Commission acquired the Cross, it was doing so solely to "assume the obligation of maintaining, repairing and otherwise caring for said Cross and the land upon which it is erected." J.A. 2970.

This Court should clarify that lower courts must examine factors such as a private party's property interests in a monument before finding a First Amendment violation. In the Establishment Clause context, "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring); *see also, e.g., id.* at 679 (majority opinion) ("[T]he focus of our [Establishment Clause] inquiry must be on the [display] in . . . context[.]"); *id.* at 690 (O'Connor, J., concurring) (analogizing government religious displays to statements, and noting the importance of judging intent by "examining the context of the statement"); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (noting that a reasonable observer in Establishment Clause cases must be "deemed aware of the history and context of the community and forum" in which the speech takes place (quoting *Capital Square Review and Advisory Bd. v.*

Pinette, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring in part and concurring in judgment))). The Court should grant the petition and hold that courts should weigh any private interests in a site when evaluating whether governmental ownership creates an Establishment Clause violation.

II. States Should be Able to Address the Public Safety Risks Posed by Historically Significant Monuments Without Dooming the Monuments Themselves.

There is no dispute that the Commission's purpose in acquiring the Peace Cross site was to "preserve the monument and address traffic safety concerns." Pet. 7. Those concerns are real, and significant: The monument is a 40-foot tall concrete tower "situated on a traffic island taking up one-third of an acre at the busy intersection of Maryland Route 450 and U.S. Route 1." Pet. App. 8a. Not only must the monument remain "well lit for public safety reasons," Pet. App. 51a (Gregory, C.J., concurring in part and dissenting in part), but it requires maintenance and repairs to prevent it from falling apart. Almost a century after its construction, the Cross shows significant deterioration, including "[o]ne crack in the middle of the rear edge [that] is deep into the core concrete and has widened over time," "cracks . . . on the north arm top surfaces," possible "corrosion of reinforcing metal," and "obvious swelling within the concrete that displaces the mosaic surface outward." J.A. 1585, 1586, 1590, 1591. The threat to public safety posed by a massive concrete structure crumbling into a busy roadway below is obvious, and

governments have an interest in mitigating that threat.

As lower courts have recognized, this Court's jurisprudence permits the expenditure of state funds for non-secular purposes, including preservation and maintenance of historic structures. *See American Atheists, Inc. v. City of Detroit Downtown Development Auth.*, 567 F.3d 278, 290 (6th Cir. 2009) (holding that Detroit did not violate the Establishment Clause by including churches in a revitalization program that allowed private properties to receive municipal reimbursements for exterior refurbishments); *Taylor v. Town of Cabot*, 178 A.3d 313, 323 (Vt. 2017) (relying on *American Atheists* to uphold town's decision to award grants to historic churches for repairs).

Governments face a "dilemma" when they cannot "maintain [a] cross" without violating the Constitution, but cannot "remove the cross without conveying disrespect for those the cross was seen as honoring." *Salazar*, 559 U.S. at 716. In *Salazar*, this Court considered whether Congress's decision to transfer a cross to a private owner was consistent with an injunction prohibiting the cross from being displayed on public land. *Id.* at 708-10. Under the Court's reasoning in *Salazar*, the Commission's desire not to dishonor the Peace Cross memorial is a legitimate concern. Nevertheless, because the Court remanded the case after clarifying the appropriate standard of review, *id.* at 722, the Court did not squarely address the ultimate question of whether the Establishment Clause *requires* states to

ignore their concerns about conveying disrespect for those honored by historic memorials.

State governments need flexibility in addressing issues involving memorials that came into and must remain under public ownership because of serious public safety concerns and whose honorees deserve respect and remembrance. The Commission should be able to address the public safety risk posed by the condition of this memorial by means that do not disserve the memory of those it honors. The Court should resolve the dilemma recognized in *Salazar*.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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AUGUST 2018

No. 18-18

In the Supreme Court of the United States

Maryland-National Capital Park and Planning Commission,

Petitioner,

v.

American Humanist Association, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF PRINCE GEORGE'S COUNTY, MARYLAND IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Am Humanist Ass'n v. Maryland-National Capital Park & Planning, Comm'n,
874 F.3d 195, 209 (4th Cir. 2017) 2

Edwards v. Aguillard,
482 U.S. 578, 586-587, 96 L. Ed. 2d 510,
107 S. Ct. 2573 (1987) 5

Lynch v. Donnelly, 465 U.S. 668, 680,
79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984) 6

Salazar v. Buono,
559 U.S. 700, 718-19 (2010) (plurality opinion) 3

Van Orden v. Perry,
545 U.S. 677, 702 (2005) 5

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Prince George's County, Maryland is the County in Maryland wherein the subject of this litigation, the "Peace Cross", is situated. Prince George's County was founded in 1696 and as such its citizens have served in every United States war, foreign and domestic. Because many of its citizens, both past and present, are veterans, and because the cross has stood as a landmark in the County for more than one quarter of its history and solely as a World War I memorial, Prince George's County has an interest in the preservation of the Peace Cross at its current location.

SUMMARY OF ARGUMENT

The County disagrees with the Fourth Circuit's opinion that the Commission's display and maintenance of the Peace Cross violates the Establishment Clause. In finding that the Peace

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no person or entity made a monetary contribution for the preparation or submission of this brief. Because Prince George's County is a "county" within the meaning of Rule 37.4 this brief is being submitted without notice to, or with the permission of, the appellees.

Cross's sectarian elements outweigh the secular elements, the Fourth Circuit placed excessive weight on the Peace Cross's association with Christianity and "immense size" while understating the overwhelming evidence of its 93-year history as a war memorial in the County. The cross was erected as understood to be a symbol of peace and a memorial to fallen veterans of World War I, and has stood purely as a war memorial since 1925. The Peace Cross has never been used for religious services.

ARGUMENT

In its opinion, the Fourth Circuit Court of Appeals placed great weight on the size of the Peace Cross and the cross's traditional association with Christianity in its holding that the cross violated the Establishment Clause of the First Amendment. *Am Humanist Ass'n v. Maryland-National Capital Park & Planning, Comm'n*, 874 F.3d 195, 209 (4th Cir. 2017) (claiming that the "immense size and prominence" of the Cross aggrandizes and universalizes religion). Neither of these concerns should override the secular history and common understanding of the cross in Prince George's County. *Id.* at 218-19 (Gregory, C.J., dissenting) (explaining that the secular elements – the plaque specifically dedicating the Cross to County veterans, the American Legion symbol, the inscription "valor, endurance, courage, and devotion"; the 90-year

history as a war memorial; and its presence among other secular war monuments – would all lead a reasonable observer to see the Peace Cross as a war memorial). As noted by this Court, the *Establishment Clause* "does not oblige government to avoid any public acknowledgement of religion's role in society". *Salazar v. Buono*, 559 U.S. 700, 718-19 (2010) (plurality opinion).

The Fourth Circuit failed to appreciate the history of using crosses to commemorate servicemen. This is readily apparent when one examines the use of crosses in association with fallen U.S. soldiers: in the fields of American military cemeteries in Europe there are white crosses as far as the eye can see. In one field, the Meuse-Argonne Cemetery in France which consists of 130 acres, 14,246 white crosses mark the graves of American soldiers who lost their lives in World War I. *See* American Battle Monuments Commission @ https://www.abmc.gov/cemeteries-memorials/europe/meuse-argonne-american-cemetery#.W0dd4tiWyUk. This reflects the cross's history as a soldier's commemorative headstone.[2] The expansive display of crosses in these

[2] A readily apparent irony in this litigation is that the deceased Prince George's County soldiers identified on the Peace Cross placard and those buried in the European cemeteries died, in part, to preserve the right of the appellees to complain about the very crosses that adorn their graves.

cemeteries dwarfs the single cross at issue in this case. The United States Army (and the United States Air Force before 1960) also uses the form of a cross in its second-highest award, the Distinguished Service Medal. *See* http://military. wikia.com/wiki/ Distinguished_Service_Cross_(United_States). The Fourth Circuit's opinion essentially ignores this significant history. Crosses historically used as war memorials should not now be held unconstitutional because their historical origins and intended meaning have been forgotten.

Further, as noted in the petitions of the parties, the site of the Peace Cross has never been used for religious purposes or understood by Prince George's County citizens as a religious symbol. It stood without challenge in Prince George's County for almost 100 years until the instant non-resident, interest group targeted it for purely ideological reasons. https://americanhumanist.org/about/ (The mission of the American Humanist Association is "to bring about a progressive society where being good without a god is an accepted and respected way to live life.") (emphasis added). The community value of paying tribute to war veterans should not be eradicated at the behest of an anti-religious group who claim offense at the monuments' use of religious symbolism for secular ends. That the cross is a symbol of Christianity does not mean that it cannot also hold other meanings that overshadow that symbolism. *Buono*, 559 U.S. at 721 ("But a Latin cross is not merely a reaffirmation of Christian

beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people.").

If the Peace Cross offended bona fide residents of the County certainly the appellees would have found them and included them as parties to this action.[3] They did not. This is illustrative of how the Peace Cross has always been viewed by residents of the County as secular, i.e., a war memorial and not as a government endorsement of religion. *See Van Orden v. Perry*, 545 U.S. 677, 702 (2005) (concluding that a monument going unchallenged for 40 years was the determinative factor indicating that it conveyed a secular message).

This Court is "normally deferential" to "articulations of a secular purpose," so long as they

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[3] Conspicuously absent from the complaint filed in this action are the addresses of the individual plaintiffs. Plaintiff Lowe concedes that he is a resident of Washington, DC. Plaintiff McNeill alleged that he was a resident of the County but his driver's license and principal place of residence is in North Carolina. It is clear that McNeill no longer lives in Prince George's County or even in the State of Maryland. Like Lowe, McNeill is a member of the American Humanist Society. Frederick Edwards is also a member of the Humanist Society and the "Freedom From Religion Foundation". His ties to the immediate community appear to be dubious at best.

are "sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-587, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987). There is no evidence of insincerity in this case, and thus no justification for the Fourth Circuit's unwillingness to fully credit the Peace Cross's stated purpose. That the monument bears a religious symbol as well as a secular one does not alter the analysis. In determining whether a secular purpose exists, this Court has simply required that the display not be "motivated wholly by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984). It is clear from the record in this case that the Peace Cross was not erected by wholly religious considerations. The fact that the monument uses symbolism that can also have religious meaning does not cast doubt on the government's valid secular purposes for its display or the common understanding of the monument by Prince George's County residents.

CONCLUSION

The Fourth Circuit erred by basing its opinion almost entirely on the size of the Peace Cross and the cross's association with Christianity. The Peace Cross has long been a landmark in Prince George's County and understood by its residents as a predominantly secular symbol of peace and as a memorial to local fallen war veterans. That the cross, as a symbol, is also associated with Christianity

should be of no moment as the record in this case establishes without challenge that the history, understanding and use of the Peace Cross in Prince George's County has been secular. This Court should grant the parties' petitions for writ of certiorari to decide the extent to which the secular history, use and understanding of a religious symbol may defeat an establishment clause challenge.

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No. 18-18

In The Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF THE PETITIONER, MARYLAND NATIONAL CAPITAL PARK AND PLANNING COMMISSION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

CONCLUSION 6

TABLE OF AUTHORITIES

Page(s)

CASES

Abington Sch. Dist. v. Schempp,
374 U.S. 203 (1963) 6

Am. Atheists, Inc. v. *Duncan*,
637 F.3d 1095 (10th Cir. 2010) 4

American Atheists, Inc. v.
Port Authority of New York and New Jersey,
760 F.3d 227 (2d Cir. 2014) 4

Briggs v. *Mississippi*,
331 F.3d 499 (5th Cir. 2003) 4

Buono v. *Kempthorne*,
527 F.3d 758 (9th Cir. 2007), *amended*,
527 F.3d 758 (9th Cir. 2008), *rev'd & remanded by Salazar v. Buomo*,
559 U.S. 700 (2010) 3-4

Buono v. *Norton*,
371 F.3d 543 (9th Cir. 2004) 3

County of Allegheny v. ACLU,
492 U.S. 573 (1989) 6

Engel v. Vitale,
370 U.S. 421 (1962) 6

Epperson v. Arkansas,
393 U.S. 97 (1968) 5, 6

Everson v. Bd. of Educ.,
330 U.S. 1 (1947) 5

Lee v. *Weisman*,
505 U.S. 577 (1992) 2

Lynch v. *Donnelly*,
465 U.S. 668 (1984) 2, 6

Murray v. *City of Austin*,
947 F.2d 147 (5th Cir. 1991) 4

Salazar v. *Bouno*,
559 U.S. 700 (2010) 2, 4

Sch. Dist. of Grand Rapids v. Ball,
473 U.S. 373 (1985) 5

Separation of Church & State Committee v.
City of Eugene,
93 F.3d 617 (9th Cir. 1996) 3

Trunk v. *City of San Diego*,
629 F.3d 1099 (9th Cir. 2011) 4

Van Orden v. *Perry*,
545 U.S. 677 (2005) 4, 5

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND I ..... *passim*

INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute (the "Institute") is an international civil liberties organization with its headquarters in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. The Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated, and in educating the public about constitutional and human rights issues.

The Institute is particularly interested in this case because the decision of the Fourth Circuit threatens citizens' First Amendment rights to freely exercise their religion. Religious freedom was the main aspiration that sent America's founders searching for independence from England. That is why the Framers included the guarantee of freedom of religion in the First Amendment. If allowed to stand, the Fourth Circuit's decision will interfere with religious freedom in a way that would have been unfathomable even by the standards of eighteenth century England—much less those of the twenty-first century United States of America.

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[1] Counsel of record for all parties received notice at least ten days before the due date of the *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief in communications on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision widens the split among the Circuits as to whether the Establishment Clause requires the eradication of all religious symbols in the public realm. This Court has consistently held that it does not, but the Ninth Circuit was the first to disagree. It was later joined by the Tenth Circuit and, now, the Fourth Circuit. In the interim, the Second and Fifth Circuits have dutily followed this Court's First Amendment jurisprudence. This split is particularly dangerous because it threatens one of the fundamental freedoms guaranteed by the First Amendment, freedom of religion. The Institute therefore respectfully requests that the petition be granted and the decision of the Fourth Circuit reversed.

ARGUMENT

The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..." As envisioned by the Framers, the Establishment Clause was intended to guarantee freedom ***of*** religion. As reinterpreted by the Fourth Circuit, however, the Establishment Clause instead guarantees freedom ***from*** religion.

This Court's precedents are clear that the Establishment Clause "does not require eradication of all religious symbols in the public realm." *Salazar* v. *Bouno*, 559 U.S. 700, 718 (2010) (plurality opinion) (citing *Lee* v. *Weisman*, 505 U.S. 577, 598 (1992)). *See also Lynch* v. *Donnelly*, 465 U.S. 668, 678-679 (1984).

According to the Fourth Circuit, however, the memorial to World War I veterans of Prince George's County that has stood in a public park for the past 93 years ago—known as the Peace Cross—simply has to go.

Why? Like the hundreds if not thousands of grave markers that dot Arlington National Cemetery, the monument at issue is in the shape of the Latin Cross. This is unacceptable, according to the panel of the Fourth Circuit that issued the decision, because the Latin Cross is "the preeminent symbol of Christianity." App. 20a. On that basis, the panel majority concluded that the Establishment Clause requires that the Peace Cross must be "raz[ed]," have its arms "remov[ed]," or be subject to "alternative arrangements that would not offend the Constitution." App. 31a-32a n.19. Like the ancient statues of Buddha in Afghanistan that the Taliban had dynamited in 2001, the Peace Cross must come down.

In fairness to the Fourth Circuit panel majority, its decision was not without precedent. It was a logical extension of prior holdings of other Circuit Courts of Appeal, beginning with the Ninth Circuit. In a series of decisions dating back more than 20 years, the Ninth Circuit has found that the Establishment Clause prohibits war memorials in the shape of a cross. This trend began with *Separation of Church & State Committee* v. *City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (per curiam). It continued with *Buono* v. *Norton*, 371 F.3d 543 (9th Cir. 2004) and *Buono* v. *Kempthorne*, 527 F.3d 758 (9th Cir. 2007), *amended*, 527 F.3d 758 (9th Cir. 2008), *rev'd by &*

remanded by Salazar v. Buono, 559 U.S. 700 (2010). And it was reaffirmed in *Trunk* v. *City of San Diego*, 629 F.3d 1099, 1110-12 (9th Cir. 2011). The Tenth Circuit has also found a "presumption of unconstitutionality" for commemorative crosses. *Am. Atheists, Inc.* v. *Duncan*, 637 F.3d 1095, 1102-03 (10th Cir. 2010) (Kelly, J., joined by Gorsuch, J., dissenting from denial of rehearing en banc).

By following these courts' precedents, the Fourth Circuit panel majority widened the split among the Circuits. Its decision stands in sharp contrast to decisions of the Second and Fifth Circuits upholding public displays of crosses in contexts analogous to those present here. In *American Atheists, Inc.* v. *Port Authority of New York and New Jersey*, 760 F.3d 227 (2d Cir. 2014), the Second Circuit upheld the display of a cross-shaped memorial at the September 11 Museum. Similarly, in *Murray* v. *City of Austin*, 947 F.2d 147, 149 (5th Cir. 1991), the court upheld the display of a Latin cross in the town seal of Austin, Texas. *See also Briggs* v. *Mississippi*, 331 F.3d 499 (5th Cir. 2003) (upholding the use of the St. Andrew's Cross in the Mississippi state flag).

This split in the Circuits should be corrected before any more damage is done to the Peace Cross, not to mention the First Amendment. Resolving this split is particularly important because the Fourth Circuit's decision is contrary to this Court's First Amendment jurisprudence. As set forth in Petitioner's Brief, the precedents of this Court that the Fourth Circuit has joined with the Ninth and Tenth Circuits to effectively overrule precedents such as *Salazar* and *Van Orden* v. *Perry*, 545 U.S. 677

(2005). Requiring the destruction or dismemberment of the Peace Cross will engender the very sort of "religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring).

This Court has consistently held that the Establishment Clause's guiding principle is government neutrality toward religion in the sense that a state cannot favor religion over non-religion or one religion over another. This neutrality principle has been set forth by this Court on multiple occasions. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *see also Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985) (noting that this Court has "consistently recognized" a requirement that "the government . . . maintain a course of neutrality among religions, and between religion and nonreligion"); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) ("Th[e] [First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.").

It is as much a violation of the Establishment Clause for the government to favor non-religion as it is for the government to favor religion. That is why the Court has noted that "'[T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward

any. Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 672 (1983) (citations omitted).

The Court has long recognized the role that religion has played in our nation's history. *See, e.g., Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 212 (1963) ("[R]eligion has been closely identified with our history and government . . . ."); *Engel v. Vitale*, 370 U.S. 421, 434 (1962) ("The history of man is inseparable from the history of religion."). The Court has also stated that "[a] secular state . . . is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed." *Allegheny*, 492 U.S. at 610. The wiping out of all public references to religion is entirely inconsistent with the Establishment Clause's mandate that government exhibit "neutrality between . . . religion and nonreligion." *Epperson*, 393 U.S. at 103-04. And such whitewashing of our country's religious history will take us dangerously close to an effective endorsement of atheism as our nation's official creed.

CONCLUSION

The Framers never envisioned that the Establishment Clause would require the obliteration of all religious symbols from every public place, especially not in the secular context in which the Peace Cross is displayed in Prince George's County, Maryland. The Fourth Circuit decision is not faithful to the text of the First Amendment or its subsequent interpretation by this Court. The Institute therefore

respectfully requests that the petition be granted and that the decision of the Fourth Circuit be reversed.

Respectfully submitted,

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AMERICAN HUMANIST ASSOCIATION, *et al.*,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* VETERANS IN DEFENSE OF LIBERTY, INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS, AND CONGRESSIONAL PRAYER CAUCUS FOUNDATION *in support of Petitioners*

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INTERESTS OF *AMICI CURIAE*[1]

Veterans in Defense of Liberty is a national advocacy group of veterans dedicated to restoring and sustaining the original moral and constitutional principles of our Republic. Members of Veterans in Defense of Liberty continue to serve with the same passion and dedication to our country as we did in combat. We continue to honor our sacred oath to support and defend the Constitution of the United States. And we act with a heightened sense of continued duty to ensure that the sacrifices of our brethren who did not come home, were not made in vain.

When we raised our hands, we did not "solemnly swear," 10 U.S.C. § 502—a life-long pledge which still ends with, "So help me God"—to merely defend a piece of paper enshrined in our collective history. Rather we also pledged to defend the society and culture it has established and guided for 229 years. It doesn't matter if the topic is voter ID, immigration, national security or Religious Liberty. They are all veterans' issues.

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[1] Pursuant to Supreme Court Rule 37, all Parties have received timely notice of intent to the file this brief and have consented to its filing. No Party or Party's Counsel authored this Brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *Amici Curiae*, their members or their Counsel, contributed money that was intended to fund the preparation or submission of this Brief.

The **International Conference of Evangelical Chaplain Endorsers** ("ICECE") has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for chaplains and all military personnel. ICECE's member organizations employ retired military chaplains as their officers.

The **Congressional Prayer Caucus Foundation** ("CPCF") is an organization established to protect religious freedoms (including those related to America's Judeo-Christian heritage) and to promote prayer (including as it has traditionally been exercised in Congress and other public places). It is independent of, but traces its roots to, the Congressional Prayer Caucus that currently has over 100 representatives and senators associated with it. CPCF has a deep interest in the right of people of faith to speak, freely exercise their religion, and assemble as they see fit, without government censorship or coercion. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. It has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from thirty-three states.

SUMMARY OF THE ARGUMENT

As the opinions below demonstrate, this Court's Establishment Clause jurisprudence contains conflicting strains. This case presents an opportunity for this Court to reconcile—where possible—those

strains and to announce a return to an Establishment Clause that would be recognizable to the Founders.

ARGUMENT

As the various opinions below demonstrate, this Court's decisions have passages that support a "strict separationist" view of the Establishment Clause that demands little, if any, public acknowledgement of religion in general and Christianity, this country's dominant religion, in particular, and passages that support the view that the Establishment Clause allows government to acknowledge and favor religion in an evenhanded manner. *Compare, e.g., Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) (the Establishment Clause prohibits "laws which . . . aid all religions" and referencing a "high and impregnable" wall of separation) (cited by panel majority below), *with Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) ("we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence"), *and Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (the Establishment Clause's "line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship"). This case provides an appropriate opportunity for the Court to align its case law with the original understanding and interpretation of the clause.

The central facts are not in dispute: the Bladensburg Cross has stood for close to a century and for years has been passed by thousands of motorists a day; it was erected as a memorial to the citizens of Prince George's County, irrespective of religious persuasion, who lost their lives in military service during World War I; the dominant religion at the time was Christianity (and still is); the Latin or Celtic cross is both a symbol of the specific, sacrificial death of Jesus Christ and, more generally, of sacrificial service; and similar memorial crosses were erected not only in this country, but throughout the world (e.g., at Arlington Cemetery in Virginia and various cemeteries and memorials for the Battle of the Somme in France). The panel majority, relying on the fact that many who supported the fundraising for the cross gave voice to the existence of a sovereign deity (like the Founding Fathers did in the Declaration of Independence), suggests that the cross might pass constitutional muster if its cross-pieces are sawn off or if it were in a close grouping of other memorials that had symbols that were specific to Judaism and Islam (and how many other religions and non-religions is left undisclosed). This is not a proper understanding of the Establishment Clause.

Of course, the clause as originally enacted only limited the Federal Government and coexisted with established churches in several states, which immediately casts doubt on the idea that the framers considered government inconsistent with religion, rather than supportive of it. But strict separationists, after incorporation of the clause through the Fourteenth Amendment, have pushed an

interpretation of the Establishment Clause that not only requires evenhanded treatment of various religions but forbids the government from favoring or acknowledging religion in any way, attacking, along with public memorials using religious symbolism, preferential tax treatment for religious organizations and ministers and recognition or commemoration of religious holidays observed by the large majority of its citizenry.

It is fair to say that the Founding Fathers, starting with George Washington and the First Congress, along with any other objective reader at the time, would be startled by the panel majority's wildly expansive interpretation of the text of the Establishment Clause. Instead, a proper understanding of the clause is that it was pro-religious, not anti-religious; it was designed to keep government out of religion, but not religion out of the public sphere. Moreover, the Establishment Clause is pro-marketplace of ideas. Like the other First Amendment freedoms of speech, press, and assembly, the clause assumes that the country's citizens are adults and will not be swayed by every whiff of government acknowledgement of the dominant beliefs of its citizens. Brought to bear on the facts of this case, it is more than far-fetched to argue that anyone who saw the Bladensburg WWI memorial, including plaintiffs, were influenced to believe in God or felt pressured to become a Christian because the generic symbolism of sacrificial service of the Bladensburg cross has a historical foundation in the death of Jesus Christ. That might give the memorial a deeper or

broader significance for many, but that is because of personal beliefs, not governmental importuning.

No one could reasonably believe that, by viewing the memorial, they were being forced to convert to Christianity or theism or being made to suffer any inducement to do so. The panel majority rightly held that using public funds to maintain the monument has a secular purpose of supporting a memorial for the county's war dead. But the panel majority was clearly wrong when it determined that maintaining a war memorial that uses symbolism most readily known to the majority of its citizenry for sacrifice places Christianity "above" other faiths. It simply recognizes the cross's dominance as recognized symbolism of personal sacrifice.

What the strict-separationist plaintiffs want in this case, and others like it, is a heckler's veto and the right to scrub the public sphere of all recognition of religion. That subverts the purpose of the Establishment Clause, which was to protect religion from the government, not to keep religion out of public life.

CONCLUSION

The *Amici* urge this Court to grant the petition for certiorari and to use this case to articulate an interpretation of the Establishment Clause more faithful to its original (and continuing) meaning.

Respectfully submitted,
this 2nd day of August 2018,

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No. 18-18

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MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

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QUESTION PRESENTED

Whether the Establishment Clause requires the removal or destruction of a 93-year-old memorial to American servicemen who died in World War I solely because the memorial bears the shape of a cross.

PARTIES TO THE PROCEEDING

The Maryland-National Capital Park and Planning Commission, petitioner on review in No. 18-18, was the defendant-appellee below.

The American Legion, The American Legion Department of Maryland, and The American Legion Colmar Manor Post 131, respondents on review in No. 18-18 and petitioners on review in No. 17-1717, intervened as defendants in the District Court and were defendants-appellees in the Court of Appeals.

The American Humanist Association, Steven Lowe, Fred Edwords, and Bishop McNeill, respondents on review, were the plaintiffs-appellants below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 3

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT 4

A. Historical Background 4

B. Factual Background 9

C. Procedural History 13

SUMMARY OF ARGUMENT 19

ARGUMENT 23

THE PEACE CROSS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE 23

A. A Government Display That Uses Religious Symbolism Is Constitutional If Its Purpose And Objective Meaning Are Secular Or If It Comports With The Nation's History And Traditions 23

B. The Peace Cross Is Constitutional 33

1. The purpose and objective meaning of the Peace Cross are secular 34

TABLE OF CONTENTS—Continued

Page

2. *The Peace Cross fits in a long history and tradition of displaying crosses as symbols of sacrifice and military valor* 44

C. The Peace Cross Is Also Constitutional Under The *Lemon* Test 54

CONCLUSION 59

TABLE OF AUTHORITIES

Page(s)

CASES:

Am. Atheists, Inc. v. *Davenport*,
637 F.3d 1095 (10th Cir. 2010) 17, 40

Am Atheists, Inc. v. *Port Auth. of N.Y. & N.J.*,
760 F.3d 227 (2d Cir. 2014) 42

Buono v. *Norton*,
371 F.3d 543 (9th Cir. 2004) 15

Capitol Square Review and Advisory Bd. v. *Pinette*, 515 U.S. 753 (1995) ..... *passim*

Cty. of Allegheny v. *ACLU*,
492 U.S. 573 (1989) ..... *passim*

Elk Grove Unified Sch. Dist. v. *Newdow*,
542 U.S. 1 (2004) 24, 33, 57

Engel v. *Vitale*,
370 U.S. 421 (1962) 24

Kondrat'yev v. *City of Pensacola*,
903 F.3d 1169 (11th Cir. 2018), *petition for cert. docketed*, No. 18-351 (U.S. Sept. 18, 2018) 47

Lambeth v. *Bd. of Comm'rs of Davidson Cty.*,
407 F.3d 266 (4th Cir. 2005) 17

Larson v. *Valente*,
456 U.S. 228 (1982) 23

Lemon v. *Kurtzman*,
403 U.S. 602 (1971) ..... *passim*

Lynch v. *Donnelly*,
465 U.S. 668 (1984) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Marsh v. *Chambers*,
463 U.S. 783 (1983) 32, 33, 49

McCreary Cty. v. *ACLU*,
545 U.S. 844 (2005) 26, 27, 28

Mueller v. *Allen*,
463 U.S. 388 (1983) 58

Newdow v. *Roberts*,
603 F.3d 1002 (D.C. Cir. 2010) 33

People of State of Ill. ex rel. McCollum v. *Bd. of Educ. of Sch. Dist. No. 71, Champaign Cty.*,
333 U.S. 203 (1948) 24

Pleasant Grove City v. *Summum*,
555 U.S. 460 (2009) 29, 36, 39

Salazar v. *Buono*,
559 U.S. 700 (2010) ..... *passim*

Santa Fe Indep. Sch. Dist. v. *Doe*,
530 U.S. 290 (2000) 58

Sch. Dist. of Abington Twp. v. *Schempp*,
374 U.S. 203 (1963) 25

Suhre v. *Haywood Cty.*,
131 F.3d 1083 (4th Cir. 1997) 15

Town of Greece v. *Galloway*,
572 U.S. 565 (2014) ..... *passim*

Trunk v. *City of San Diego*,
629 F.3d 1099 (9th Cir. 2011) 17

Trunk v. *City of San Diego*,
660 F.3d 1091 (9th Cir. 2011) 47

TABLE OF AUTHORITIES—Continued

Page(s)

Van Orden v. *Perry*,
545 U.S. 677 (2005) ..... *passim*

Walz v. *Tax Comm'n of City of New York*,
397 U.S. 664 (1970) 23

Zelman v. *Simmons-Harris*,
536 U.S. 639 (2002) 55, 56, 57

STATUTES:

28 U.S.C. § 1254(1) 3

Consolidated Appropriations Act, 2005, Pub. L. No. 108–447, div. J, tit. I, § 116(a), 118 Stat. 2809, 3346 ..... 35, 49

Department of Defense Appropriations Act, 2002, Pub. L. No. 107–117, div. A, tit. VIII, § 8137(a), 115 Stat. 2230, 2278 ..... 8, 35, 49

Md. Code Ann., Land Use § 15-101 13

Preservation of Mt. Soledad Veterans Memorial, Pub. L. No. 109-272, 120 Stat. 770 (2006) 49

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XIV 3

LEGISLATIVE MATERIAL:

H.R. Res. 16, 68th Cong. (1924) 6, 35

S. J. Res. 243, 75th Cong. (1938) 45

TABLE OF AUTHORITIES—Continued

Page(s)

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TABLE OF AUTHORITIES—Continued

Page(s)

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IN THE

Supreme Court of the United States

No. 18-18

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

INTRODUCTION

For 93 years, a monument commonly referred to as the Peace Cross has stood in commemoration of the residents of Prince George's County, Maryland who perished in the First World War. The Peace Cross is adorned with and surrounded by symbols of secular commemoration: a plaque dedicating it to the servicemen who died; inscriptions honoring the universal values for which they fought; and nearby monuments to those who fell in other wars or national tragedies. It has an unbroken history of community

use as a site for civic commemorative events. And its shape, like hundreds of other monuments built in the aftermath of World War I, takes the form of a Latin cross, the "central symbol of the [World War I] overseas cemetery." JA 1143.

Nonetheless, a divided panel of the Fourth Circuit declared the Peace Cross unconstitutional—and suggested possible remedies like "removing the arms or razing the Cross entirely"—solely because it bears the shape of a cross. Pet. App. 31a-32a & n.19. That decision was grievously incorrect. Time and again, the Court has made clear that the Establishment Clause does not "require eradication of all religious symbols in the public realm." *Salazar* v. *Buono*, 559 U.S. 700, 718 (2010) (plurality). Rather, virtually every Member of the Court has agreed that, at minimum, the government may display symbols associated with religion where the display's purpose and objective meaning are predominantly secular, or where the display fits within a long national tradition of similar practices.

The Peace Cross is easily constitutional on both grounds. Its context and history make plain that it was intended to serve—and, for 93 years, *has* served—as a secular memorial to the war dead. And similar symbolic uses of the cross for secular commemoration have existed in this Nation since before the Founding. If the Peace Cross must fall, so too must numerous other monuments—including two World War I crosses of comparable size and longevity in nearby Arlington National Cemetery.

The Establishment Clause does not compel these senseless results. The Peace Cross fully accords with the Constitution's call for religious neutrality. And

the Court should "let those honored rest in peace." Pet. App. 100a (Wilkinson, J., dissenting from denial of rehearing en banc). The judgment should be reversed.

OPINIONS BELOW

The Fourth Circuit's opinion (Pet. App. 1a-52a) is reported at 874 F.3d 195. The District Court's opinion (Pet. App. 53a-85a) is reported at 147 F. Supp. 3d 373. The Fourth Circuit's order and opinions denying rehearing en banc (Pet. App. 86a-105a) are reported at 891 F.3d 117.

JURISDICTION

The Fourth Circuit entered judgment on October 18, 2017. Petitioner filed a timely petition for rehearing en banc, which was denied on March 1, 2018. On May 9, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 29, 2018. *See* No. 17A1175. This Court granted certiorari on November 2, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Establishment Clause of the First Amendment, U.S. Const. amend. I, provides:

> Congress shall make no law respecting an establishment of religion.

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

A. Historical Background

1. World War I caused death on a scale that the United States had not experienced since the Civil War. Over the course of the war, more than ten million soldiers from combatant nations gave their lives fighting in Europe. JA 934-935. And in just 19 months, from Congress's declaration of war in April 1917 until the Armistice, over 126,000 American servicemen perished. JA 935; *see* Nese F. DeBruyne, Cong. Research Serv., American War and Military Operations Causalities: Lists and Statistics 2 (2018).

During the war, the U.S. military interred the remains of the fallen in makeshift cemeteries in Europe. Except where its records reflected that a soldier was Jewish—and identifying soldiers was often impossible due to the newly destructive power of the weapons used—the military buried each serviceman under a temporary wooden cross. JA 934-937, 941-943. Photographs of wartime cemeteries published around the world depicted thousands of wooden crosses, arranged in seemingly endless rows. JA 941-943. Few soldiers who served in the war forgot the image of those seas of crosses, which evoked the horrors of the trenches and "the brotherhood of the men who fought in them." JA 940. And for families at home, separated by thousands of miles from the graves of their loved ones, the crosses were an indelible symbol of sacrifice and loss. JA 938.

As respondents' own expert has written, "the cross" thus became "a central symbol of the American overseas cemetery" and "a cultural image of the battlefield." JA 1127, 1143; *see* JA 937-938. Numerous works of poetry, literature, and visual art em-

ployed the cross to represent the aspirations and futility of the Great War. In one of the most famous poems of the war, soldier-poet John McCrae wrote:

> In Flanders fields the poppies blow
> Between the crosses, row on row
> That mark our place * * * *

John McCrae, *In Flanders Fields* (1915), *reprinted in* In Flanders Fields and Other Poems 3 (G.P. Putnam's Sons ed., 1919). Vincente Blasco Ibáñez's novel *The Four Horsemen of the Apocalypse*, the best-selling book in America in 1919, used the image of fields of wooden crosses in its climactic scene to symbolize the war's monumental toll.[1] In his allegorical painting *Youth Mourning* (1916), George Clausen depicts a woman bent over in grief on the edge of a battlefield, overshadowed by a large wooden cross.[2]

The U.S. Government itself employed crosses as a central symbol of the war. During the war, the Government printed posters with images of Latin crosses as battlefield gravesite markers to encourage Americans to invest in war bonds.[3] In 1918 and 1919, the President and Congress established three new medals for valor, all in the shape of a cross: the

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[1] Vincente Blasco Ibáñez, The Four Horsemen of the Apocalypse (1916).

[2] George Clausen, *Youth Mourning*, Imperial War Museum (1916), *available at* https://www.iwm.org.uk/collections/item/object/5151.

[3] *E.g.*, *He fought to a finish – You lend to finish Victory Liberty Loan*, Library of Congress (1917), *available at* http://www.loc.gov/pictures/item/00652369/.

Distinguished Service Cross, the Navy Cross, and the Air Force Cross. *See* JA 147-151.

When the time came to replace the temporary grave markers in Europe with permanent headstones, veterans groups and Congress strongly advocated retaining the cross shape. The American Legion and the American War Mothers described these crosses as "symbols of sacrifice and remembrance." JA 1146-47; *see* Historic Am. Landscapes Survey, Nat'l Park Serv., Meuse-Argonne American Cemetery & Memorial 30 (2015). A congressional resolution likewise explained that "these wooden symbols have * * * been regarded as emblematic of the great sacrifices which that war entailed." H.R. Res. 16, 68th Cong., at 1 (1924) (at JA 1163-64). The American Battle Monuments Commission made a simple stone cross the default burial marker, including for soldiers whose identity or religion was unknown, while allowing Jewish soldiers to be buried under the Star of David. JA 1147. Several Jewish families elected the cross for their loved ones' graves, stating that they wished "that no distinction be made between them and their Christian comrades." *See* Michael Sledge, Soldier Dead: How We Recover, Identify, Bury, & Honor Our Military Fallen 205 (2005).

2. The aftermath of the war led to an outpouring of monument building to commemorate the men who had fought and died. Many chose to erect these monuments in the shape that had become synonymous with wartime loss: the cross. JA 937-938. Cross monuments served as a reminder of the sacrifices of the fallen soldiers and the cause for which they had fought. *Id.* They also filled an acute need

created by the "scattering of the fallen": Because over 40 percent of servicemen were buried in overseas cemeteries, these monuments served as echoes of those distant tombstones and provided a place for families to grieve and remember. JA 934-937.

Two large cross monuments were built at Arlington National Cemetery. The Argonne Cross, erected in 1923, stands 13 feet tall, contains an image of an eagle and a wreath, and is dedicated "[i]n memory of our men in France."[4] The Canadian Cross of Sacrifice, which was donated to the United States by Canada in 1927, is similar: It is 24 feet high, inlaid with a bronze sword, and contains a dedication to the "citizens of the United States who served in the Canadian Army and gave their lives in the Great War." JA 951-952.[5]

Many other monuments follow a similar design. The St. Mihiel American Cemetery in France features a large limestone cross monument dedicated "to those who died for their country."[6] Sunrise Rock

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[4] *Argonne Cross (WW I)*, Arlington Nat'l Cemetery, https://www.arlingtoncemetery.mil/Explore/Monuments-and-Memorials/Argonne-Cross (last visited Dec. 16, 2018).

[5] Nick Metcalfe, *The Canadian Cross of Sacrifice at Arlington National Cemetery*, https://ww1sacrifice.com/2015/10/29/the-canadian-cross-of-sacrifice-at-arlington-national-cemetery/ (last visited Dec. 16, 2018); *see also Canadian Cross of Sacrifice (WW I/WW II/Korea)*, Arlington Nat'l Cemetery, https://www.arlingtoncemetery.mil/Explore/Monuments-and-Memorials/Canadian-Cross (last visited Dec. 16, 2018).

[6] Am. Battle Monuments Comm'n, St. Mihiel American Cemetery and Memorial 9, *available at* https://www.abmc.gov/sites/default/files/publications/St.Mihiel_Booklet.pdf (last visited Dec. 16, 2018).

in the Mojave Desert contains an unadorned cross honoring veterans of the war—a monument that Congress has designated as "a national memorial commemorating United States participation in World War I and honoring the American veterans of that war." Department of Defense Appropriations Act, 2002, Pub. L. No. 107–117, div. A, tit. VIII, § 8137(a), 115 Stat. 2230, 2278; *see Buono*, 559 U.S. at 705-706 (plurality). By one estimate, at least 40 World War I monuments were built in the United States that bear the shape of a cross. JA 1130.[7]

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[7] *E.g.*, *28th Infantry Division National Shrine & Monuments*, Pennsylvania Military Museum, https://www.pamilmuseum.org/the-monuments-shrine/ (last visited Dec. 16, 2018) (Boalsburg, Pennsylvania); *Jerome Township Cemetery World War I Memorial Cross*, Nat'l War Mem'l Registry, https://www.nationalwarmemorialregistry.org/joomla/war-memorial-registry-search/ohio/jerome-township-cemetery-world-war-i-memorial-cross (last visited Dec. 16, 2018) (Plain City, Ohio); *Cannon County World War I-II Memorial*, Nat'l War Mem'l Registry, https://www.nationalwarmemorialregistry.org/joomla/war-memorial-registry-search/tennessee/cannon-county-world-war-i-ii-memorial (last visited Dec. 16, 2018) (Woodbury, Tennessee); *Cypress Hills National Cemetery*, Nat'l Park Serv., https://www.nps.gov/nr/travel/national_cemeteries/new_york/cypress_hills_national_cemetery.html (last visited Dec. 16, 2018) (Brooklyn, New York); *The Rustic Cross*, Smithsonian Am. Art Museum Art Inventories Catalog, https://tinyurl.com/y93z36h3 (last visited Dec. 16, 2018) (Augusta, Georgia); Dave Pelland, *Wayside Cross, New Canaan*, CT Monuments.net: Connecticut History in Granite and Bronze (July 8, 2011), http://ctmonuments.net/2011/07/wayside-cross-new-canaan/ (New Canaan, Connecticut).

Numerous World War I monuments abroad use the cross symbol, as well. JA 944-954. The United Kingdom, Canada, and Australia collectively built hundreds of "Crosses of Sacrifice" to commemorate the war. *See* JA 951-954; Jeroen Geurst, Cemeteries of the Great War by Sir Edwin Lutyens 46 (2010); Bruce Scates & Rebecca Wheatley, *War Memorials*, *in* 3 The Cambridge History of The First World War: Civil Society 528 (Jay Winter ed., 2014). France—a country whose policy of *laïcité* commands strict separation of church and state—marked graves in its battlefield cemeteries with crosses, JA 945-948, mirroring the battlefield "*croix de bois*" (wooden crosses) that had become known as "the privileged sign of French loss," Scates & Wheatley, *supra*, at 536. Germany shared the symbol, as reflected poetically by a mourner at the war cemetery at Roggevelde, who described "cross upon cross * * * on most of the graves there were low, yellow wooden crosses." Jay Winter, Sites of Memory, Sites of Mourning 109 (2014). As Charles Jagger, a veteran of World War I and a prominent post-war sculptor for the British War Memorials Committee, explained, the cross "has been and probably always will be the symbol of the Great War." Alex King, Memorials of the Great War in Britain: The Symbolism and Politics of Remembrance 129 (1998).

B. Factual Background

1. In 1919, residents of Prince George's County, Maryland also chose to use the symbol of the cross to commemorate those they had lost in World War I. JA 909. That year, a group of bereaved mothers and other residents of the county formed the Prince George's County Memorial Committee for the pur-

pose of honoring the 49 residents of the county who had died in the war. Pet. App. 55a; *see* JA 974, 988-990. In its fundraising materials, the committee explained that it wished to build a memorial at "a strategic position" on "the Defense Highway leading from Washington to Annapolis," so that "the friends and loved ones of those who were in the great conflict will pass daily over a highway memorializing their boys who made the supreme sacrifice," and so that visitors could "renew the fires of patriotism and loyalty to the nation which prompted these young men to rally to the defense of the right." Pet. App. 56a. The citizen-organizers also distributed fund-raising pledge sheets that declared their "trust[] in God" and stated that "we contribute to this memorial cross commemorating the memory of those who have not died in vain." Pet. App. 55a-56a.

The committee hired John Joseph Earley, a noted sculptor and pioneer in the figurative use of concrete, to design the monument. JA 906, 909. The committee broke ground on the memorial site in September 1919. Pet. App. 56a; *see* JA 910, 989. The mother of the first county resident killed in France shoveled the ceremonial first spadeful of earth, and Secretary of the Navy Josephus Daniels delivered the keynote address. *Id.* Following the groundbreaking, one bereaved mother wrote to her senator thanking him for his contribution in support of the monument: "The chief reason I feel so deeply in this matter," she explained, is that "my son * * * lost his life in France and because of that I feel that our memorial cross is, in a way, his grave stone." JA 989; *see also* JA 937 & n.11.

By 1922, the committee had run out of funds, and construction halted. JA 910. To save the effort, a local post of the American Legion—a patriotic veterans organization formed after World War I—took over the project. JA 905-912. It completed the monument in 1925. At the dedication ceremony, U.S. Representative Stephen W. Gambrill gave a speech honoring the "men of Prince George's County" who "fought for the sacred right of all to live in peace and security." JA 933. He expressed hope that the cross, which he at one point referred to as "symbolic of Calvary," would "let us keep fresh the memory of our boys who died for a righteous cause." JA 449, 933; *see also* Pet. App. 59a.

2. The Peace Cross rises 32 feet above its pedestal and bears the shape of a Latin cross. JA 1528; Pet. App. 54a. At its base, a large plaque lists the names of the 49 residents of Prince George's County who died in the war, and states: "This Memorial Cross is dedicated to the heroes of Prince George's County, Maryland, who lost their lives in the Great War for the liberty of the world." JA 932. At the bottom, the plaque bears a quotation from President Wilson's speech to Congress asking for a Declaration of War, stating "The right is more precious than peace." *Id.*[8] Four words are inscribed on the monument, one on each face: "VALOR; ENDURANCE; COURAGE; DEVOTION." JA 990-991; *see also* Pet. App. 24a, 55a. The symbol of the American Legion is displayed

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[8] The full inscription reads: "The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives. Woodrow Wilson." JA 932.

at the monument's center, and an American flag flies at one side. JA 931, 1453; Pet. App. 8a, 55a. Not a single word with a religious connotation appears on or near the Peace Cross.

In the decades since the Peace Cross was erected, other memorials have been built nearby to honor the veterans and fallen of other conflicts—a collection now known as Veterans Memorial Park. Pet. App. 60a, 102a; JA 993. In 1944, a local American Legion post constructed a stone scroll 200 feet south of the Peace Cross to honor the men and women of Prince George's County who died in World War II. JA 991-992. On July 4, 1983, a monument was dedicated beside the World War II memorial to honor the veterans of the Korean and Vietnam Wars. JA 993. Other memorials within this small park commemorate the War of 1812, the victims of Pearl Harbor, and the lives lost on September 11, 2011. JA903, 1528-29; *see also* JA 934. Recently, the community added two 38-foot-tall markers depicting soldiers who fought in the Battle of Bladensburg. JA 1530.

From its inception and up through the present day, the Peace Cross has consistently been used by the local community as the site of patriotic events to honor the Nation's veterans. *See, e.g.*, JA 235-273, 541-612. These events have routinely taken place on Veterans Day, Memorial Day, or Independence Day, and typically follow the same format: There is the presentation of colors, a singing of the national anthem, an invocation, a keynote speaker—often a veteran or military official—a song or readings, the laying of a wreath or flowers, a benediction, and a reception. JA 319-323. The only mention of a religious event at the memorial is a private newspaper

advertisement for a revival meeting from 1931, and there is no record that the event actually took place. JA 1432; *see* Pet. App. 62a & n.5. Until the present suit, no one ever challenged the monument's legality. Pet. App. 23a.

In 1960, petitioner the Maryland-National Park and Planning Commission (the Commission), an independent Maryland state agency, acquired the Peace Cross in order to preserve the monument and address traffic safety concerns arising from the expansion of a nearby roadway. Pet. App. 59a-60a, 72a; Md. Code Ann., Land Use § 15-101; *see also* JA 1386-87. When the Commission obtained the monument, the American Legion reserved the right "to hold memorial services to departed veterans and other ceremonies" at the memorial. JA 1387; *see also* Pet. App. 60a. Over the five decades that followed, the Commission spent approximately $117,000 to maintain and preserve the monument; in 2008, it budgeted $100,000 for renovations. Pet. App. 8a, 63a. The Monument has been listed on the National Register of Historic Places and forms a part of the Star Spangled Banner National Historic Trail. JA 1599-1601; *see also* Pet. App. 63a n.6.

C. Procedural History

1. Respondents are three local residents and the American Humanist Association. Respondent Steven Lowe has lived in the area for decades and first encountered the Peace Cross in 1982. JA 29. He estimates that he "passes [the Cross] on average, about once a month." *Id.* Respondent Fred Edwords first saw the monument in 2002 and has seen it several times since, while respondent Bishop McNeill

moved to the area in 2013 and saw it at least four times that year. *See* JA 30.

Respondents filed this suit in 2014. *See* JA 27. They contended that, because of its shape, the Peace Cross constitutes an unconstitutional endorsement of Christianity, and asked that the court order the removal or demolition of the memorial, or the removal of its arms "to form a non-religious slab or obelisk." Pet. App. 11a n.7. The American Legion and its local affiliates intervened as defendants. After extensive discovery—in which the parties introduced expert reports and produced thousands of pages of documents—the parties moved for summary judgment.

The District Court granted summary judgment to the defendants. Pet. App. 54a. The court found "uncontroverted," "overwhelming evidence" that "the predominant purpose of the [Peace Cross] was for secular commemoration." Pet. App. 72a-73a. Furthermore, it found that the monument's "history and context"—including the numerous "secular elements on its face," the "secular memorials" that surround it, the monument's "nearly exclusive use" as a war memorial "for its entire history," and the absence of any legal challenge for nearly nine decades—made clear to any "reasonable observer" that the Peace Cross does not "endors[e] religion." Pet. App. 77a-78a. The district court accordingly concluded that the Peace Cross satisfies the requirements of both *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and the analysis applied by Justice Breyer's concurrence in *Van Orden* v. *Perry*, 545 U.S. 677 (2005). *See* Pet. App. at 83a.

2. A divided panel of the Fourth Circuit reversed.[9] Writing for the majority, Judge Thacker "s[aw] fit to apply *Lemon*" in this case, while giving "due consideration" to the "factors" Justice Breyer considered in *Van Orden*. Pet. App. 17a. The panel acknowledged that the memorial "satisfied the first prong of *Lemon*": The Commission had "obtained the Cross" to "maint[ain] *** safety near a busy highway intersection," and it "preserve[d] the memorial to honor World War I soldiers," both plainly "legitimate secular purposes." Pet. App. 19a. But the panel concluded that the memorial "fails the second and third prongs of *Lemon*" because it "endorses Christianity—not only above all other faiths, but also to their exclusion." Pet. App. 28a, 31a.

The panel rested this conclusion on a single, overriding consideration: that the memorial bears the shape of a large cross. "The Latin cross," the panel reasoned, "is the 'preeminent symbol of Christianity.'" Pet. App. 20a (quoting *Buono* v. *Norton*, 371 F.3d 543, 545 (9th Cir. 2004)). Although a cross "may generally serve as a symbol of death and memorialization," the court continued, "it only holds value as a symbol of death and resurrection *because* of its affiliation with the crucifixion of Jesus Christ." Pet. App. 20a-21a. Thus, the panel concluded, "[e]ven in the memorial context, a Latin cross serves not simply as a generic symbol of death, but rather a

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[9] The Fourth Circuit found that respondents had standing because they had endured "unwelcome direct contact with a religious display that appears to be endorsed by the state" when "driving in the area." Pet. App. 13a (quoting *Suhre* v. *Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997)).

Christian symbol of the death of Jesus Christ." Pet. App. 21a.

The panel found that neither the history of the Peace Cross nor its secular content and context altered this exclusively sectarian meaning. The historical use of the cross "as a commemorative symbol of World War I" was "of no moment," the panel reasoned, because crosses "on World War I battlefields were *individual*—rather than universal—memorials to the lives of Christian soldiers." Pet. App. 21a-22a. Likewise, it was immaterial that the Peace Cross had "stood unchallenged for 90 years" and "primarily" been used for "veteran-focused ceremonies" throughout that time. Pet. App. 23a. The "invocations and benedictions" at veterans' events, the panel stated, were themselves "group prayer[s]." *Id.* Further, the panel claimed that, unlike the Ten Commandments and "In God We Trust," the Latin cross is not "well known as being tied to our Nation's history and government." Pet. App. 22a. And, notwithstanding *Van Orden*, it was "too simplistic" to consider the monument's long history without challenge to be evidence of its "secular effect." Pet. App. 23a-24a. "Perhaps the longer a violation persists," the panel countered, "the greater the affront to those offended." *Id.*

The panel likewise discounted the monument's exclusively secular content and context. "Admittedly," the panel said, "the Cross contains a few secular elements," including "the plaque," "the Legion symbol," "the words 'valor,' 'endurance,' 'courage,' and 'devotion' inscribed on its base," the "American flag flying in its vicinity," and "its location in the Veterans Memorial Park." Pet. App. 24a. But the panel

expressed concern that "passers-by" might not view all of the monument's secular features, since it is "located in a high-traffic area" where "one could [not] easily park," and the plaque is "weathered" and once was partially "obscured" by "bushes." Pet. App. 25a-26a (citing *Am. Atheists, Inc.* v. *Davenport*, 637 F.3d 1095, 1121 (10th Cir. 2010)). The panel added that a "reasonable observer" "could not help but note" that the monument is taller and more "prominent" than the surrounding monuments. Pet. App. at 28a. This discrepancy, the panel reasoned, "evoke[d] a message of aggrandizement and universalization of religion." Pet. App. 24a-25a (quoting *Trunk* v. *City of San Diego*, 629 F.3d 1099, 1116 n.18 (9th Cir. 2011)).

Thus, the court held that "the Cross * * * ha[s] the primary effect of endorsing religion." Pet. App. 27a. And, for much the same reason, it found that the Commission's maintenance of the Peace Cross resulted in "excessive entanglement between government and religion." Pet. App. 30a (quoting *Lambeth* v. *Bd. of Comm'rs of Davidson Cty.*, 407 F.3d 266, 272-273 (4th Cir. 2005)). By expending even "de minimis" funds to preserve the monument, the panel said, the Commission impermissibly "promot[ed] * * * a religious doctrine, Christianity." Pet. App. 30a-31a & n.18.

Chief Judge Gregory dissented. He explained that "the Supreme Court has consistently concluded that displays with religious content—but also with a legitimate secular use—may be permissible under the Establishment Clause." Pet. App. 43a (internal quotation marks omitted). In his view, that principle resolved this case: The "appearance, context, and factual background" of the Peace Cross made clear to

the reasonable observer that "the Memorial, while displaying a religious symbol, is a war memorial built to celebrate the forty-nine Prince George's County residents who gave their lives in battle." Pet. App. 44a-45a, 49a (emphasis omitted). The majority's conclusion that "the size of the Latin cross * * * overwhelms these secular elements," Chief Judge Gregory wrote, "would lead to per se findings that all large crosses are unconstitutional despite any amount of secular history and context." Pet. App. 44a-45a.

3. The Fourth Circuit voted 8-6 to deny rehearing en banc. *See* Pet. App. at 87a-88a. Chief Judge Gregory, Judge Wilkinson, and Judge Niemeyer all filed dissents. *See* Pet. App. at 88a. Chief Judge Gregory reiterated the views in his panel dissent, Pet. App. 98a, and Judge Wilkinson agreed: He would have "let the cross remain and let those honored rest in peace." Pet. App. 100a. Judge Niemeyer explained that "[i]t strains established judicial analysis to conclude that *Van Orden* does not allow the monument in this case to stand," given that every "observation[ ]" that Justice Breyer made of the Ten Commandments monument in *Van Orden* is applicable to the Peace Cross, too. Pet. App. 105a. Judge Niemeyer added that, by striking down the memorial, the panel's decision needlessly "puts at risk hundreds, and perhaps thousands, of similar monuments," including "those in nearby Arlington National Cemetery, where crosses of comparable size stand in commemoration of fallen soldiers." Pet. App. 101a, 105a.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision would compel the removal or destruction of a 93-year-old war memorial that was erected to honor the men who died in World War I, and that for nine decades has been used exclusively for that purpose, solely because it bears the shape of a cross. That decision was profoundly mistaken, and neither the Establishment Clause nor this Nation's history and traditions support it.

A. The Court has time and again held that the Establishment Clause "does not require eradication of all religious symbols in the public realm." *Buono*, 559 U.S. at 718 (plurality). Rather, governments may permissibly display symbols associated with a particular religion in order to promote universal values, honor historical events, or acknowledge the role of religion in society. *See Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment); *Lynch* v. *Donnelly*, 465 U.S. 668, 674-675 (1984). Such benign invocations of religion do not meaningfully threaten the values of religious neutrality the Clause protects. On the contrary, requiring the destruction or dismemberment of buildings, monuments, and other cherished structures that employ religious symbols and idioms would tend to promote the very sort of religiously-based divisiveness the Clause is designed to avoid. *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in judgment).

Members of this Court have not agreed on a single test to govern Establishment Clause challenges to passive displays that use religious symbols. But all have agreed that, at minimum, such displays comport with the Establishment Clause in at least two circumstances.

First, there is widespread agreement that a display does not violate the Establishment Clause if both the government's *purpose* in maintaining the display and the *objective meaning* of the display are predominantly secular. In recent cases, the Court has made clear that courts should take a wide-angle view of the monument's context in identifying its purpose and meaning: In addition to examining the face of the display and its immediate surroundings, courts should consider how the symbol is generally used, the circumstances surrounding the monument's placement, the broader physical setting of the monument, and the history of the monument. In *Van Orden*, Justice Breyer's controlling opinion applied this approach to uphold a display of the Ten Commandments on the grounds of the Texas State Capitol. 545 U.S. at 703-704 (Breyer, J., concurring in judgment). And in *Buono*, the plurality applied a similar approach to invalidate an injunction that would have compelled the removal of a 76-year-old cross-shaped World War I memorial. 559 U.S. at 719-721 (plurality).

Second, the Court has held that a display or practice accords with the Establishment Clause if it fits within a longstanding history or tradition of similar practices. *Town of Greece* v. *Galloway*, 572 U.S. 565, 576-577 (2014). When a longstanding practice has not stirred sectarian controversy, that is a powerful indicator that it can coexist peacefully with principles of disestablishment. Moreover, individuals will generally understand such longstanding traditions as ways of solemnizing or of honoring universal values, not as means of expressing religious favoritism or coercing religious practice.

B. Under either of these approaches, the Peace Cross is plainly constitutional.

Every one of the contextual factors this Court has previously considered affirms that the purpose and objective meaning of the Peace Cross are secular. The symbol at the heart of the monument—the cross—has a ubiquitous and well-established meaning of commemorating military valor and sacrifice, especially when associated with World War I. Multiple physical features of the monument—including the dedication, inscriptions, and American Legion symbol, as well as the monument's origin as a way of commemorating the war dead—reinforce that secular message. The physical setting of the monument, Veterans Memorial Park, is a collection of secular memorials to the fallen of our Nation's conflicts. And the monument's nine-decade history without controversy, during which time it acquired an additional meaning as an artistic and historical landmark, confirms that the Peace Cross has a secular purpose and meaning.

The Peace Cross also fits within a widespread and venerable national tradition of using the cross as a symbol of valor and sacrifice. Monuments using the cross this way have existed in this Nation since before the Founding, and cross-shaped military memorials are especially common to honor those who fell in the Civil War and World War I. Congress has given recognition to this tradition by enacting statutes that designate cross-shaped memorials as national monuments to war dead and by creating military decorations in the shape of a cross to honor martial valor. The Peace Cross fits well within this tradition.

The principles underlying the Establishment Clause confirm that it is constitutional. If the Peace Cross must fall, then so too must countless other longstanding monuments to war dead, including the Argonne Cross and Canadian Cross of Sacrifice at Arlington National Cemetery. Such widespread acts of destruction would evince profound disrespect for those most deserving of the Nation's honor, and would tend to promote the very sort of social conflict the Establishment Clause seeks to avoid.

C. Because the basic principles of the Court's Establishment Clause precedents lead to a clear result, the Court need not apply the *Lemon* test here. But that test yields the same conclusion. As even the Fourth Circuit recognized, the Commission has an obvious and legitimate secular purpose for maintaining the Peace Cross. For all the reasons the Peace Cross passes muster under the proper analysis outlined above, it also has a secular effect. The Fourth Circuit concluded otherwise only by conceiving of the "reasonable observer" as an imperfectly informed passerby who would overlook the monument's secular context and history; the Court's precedents firmly instruct otherwise. Nor does the Peace Cross entangle the government with religion, as its maintenance requires no involvement with religious activities at all.

Under any approach, the Peace Cross comports with the Establishment Clause. No sensible application of the Constitution would compel its destruction or dismemberment. The judgment below should be reversed.

ARGUMENT

THE PEACE CROSS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

A. A Government Display That Uses Religious Symbolism Is Constitutional If Its Purpose And Objective Meaning Are Secular Or If It Comports With The Nation's History And Traditions.

1. The Establishment Clause mandates religious neutrality. It bars any governmental effort to favor one religion or denigrate another. *Larson* v. *Valente*, 456 U.S. 228, 246 (1982). It prohibits state efforts, implicit or otherwise, to coerce religious practice. *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 668-669 (1970). It forbids the establishment of a state church, or state interference in how private citizens choose (or choose not) to worship. *Id.* at 669. These principles are not disputed here.

These principles do not, however, "compel the government to purge from the public square all that in any way partakes of the religious." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in judgment). As centuries of practice and decades of this Court's precedents have made clear, the government may use language and display symbols drawn from religion without contravening the constitutional commitment to religious neutrality. Government buildings—from this Court to town halls throughout the country—use religious symbols to invoke shared values like pluralism and respect for law. *See Van Orden*, 545 U.S. at 688-689 (plurality). Monuments scattered across battlefields and municipal parks employ religious imagery to honor heroic achieve-

ments and commemorate historic events. *See Buono*, 559 U.S. at 721 (plurality). The national anthem, the pledge, and the dollar bill—like the mottoes, flags, and seals of many States—explicitly invoke the importance Americans assigned divine providence at the Nation's Founding. *See Lynch*, 465 U.S. at 676; *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 35-36 & n.* (2004) (O'Connor, J., concurring in judgment).

The ubiquity of these references to religion is unsurprising. "The history of man is inseparable from the history of religion." *Engel* v. *Vitale*, 370 U.S. 421, 434 (1962). Much "in our culture worth transmitting"—indeed, much "which gives meaning to life"—"is saturated with religious influences." *People of State of Ill. ex rel. McCollum* v. *Bd. of Educ. of Sch. Dist. No. 71, Champaign Cty.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring). It is natural that Americans have often chosen to express their values and honor their history in words and idioms that reference religion. *See Newdow*, 542 U.S. at 35-36 (O'Connor, J., concurring in judgment).

As the Court has time and again explained, such benign invocations of religion do not in any meaningful way threaten the values the Establishment Clause is designed to protect. *See Lynch*, 465 U.S. at 673-678. Because they speak to values or honor historical memories that Americans may share irrespective of their religion, such symbols and practices do not diminish anyone's status in the political community because of her religious beliefs, or her adherence to no religion at all. *See id.* at 692-693 (O'Connor, J., concurring). They do not coerce anyone, implicitly or otherwise, to adhere to a par-

ticular doctrine, or place the weight of government behind a favored creed. *Cty. of Allegheny* v. *ACLU*, 492 U.S. 573, 660-663 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

On the contrary, proscribing these widespread practices and symbols would itself "tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in judgment). It would uproot long-settled practices and compel the demolition or dismemberment of countless cherished buildings and monuments. *Id.* at 702-703. Such "a brooding and pervasive devotion to the secular" would evince not neutrality toward religion, but "a passive, or even active, hostility to the religious." *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). And it would inevitably "create new controversy" and "begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Town of Greece*, 572 U.S. at 577.

2. For these reasons, it is undisputed that there is no categorical prohibition on government displays, buildings, and monuments that employ religious symbolism. On the contrary, the Court has repeatedly upheld physical displays that use religious symbols, including the crèche in *Lynch*, the menorah in *Allegheny*, and the Ten Commandments in *Van Orden*.

This Court has sometimes divided, however, on the proper approach for evaluating such displays. Members of the Court have disagreed as to whether an improper government *purpose* is necessary or sufficient to establish that a passive display is unconsti-

tutional. *Compare McCreary Cty.* v. *ACLU*, 545 U.S. 844, 861-862 (2005), *with id.* at 902 (Scalia, J., dissenting). Justices have also disagreed as to whether a display may constitutionally favor religion over non-religion generally. *See Town of Greece*, 572 U.S. at 619 (Kagan, J., dissenting) (describing disagreement).

But nearly every Member of the Court has agreed on at least this much: A passive monument that uses religious symbolism does not violate the Establishment Clause if either (1) the purpose and the objective meaning of the display are predominantly secular, or (2) the monument fits into a national history and tradition of similar displays. Justices have divided on the appropriate result if one or both of those criteria is *not* satisfied. But the Court has been virtually unanimous that a monument is constitutional at least where both are.

a. First, every Member of the Court to consider the question has agreed that, at minimum, an Establishment Clause challenge to a passive display fails out of the gate if both the government's purpose in maintaining the display and the objective meaning of the display are predominantly secular.

In *Van Orden* and *McCreary*, for instance, every Justice agreed that a government may permissibly display the Ten Commandments if the purpose and objective meaning of the display is to communicate a moral, legal, or historical message. In his controlling concurrence in *Van Orden*, Justice Breyer upheld the display of a Ten Commandments monument on the grounds of the Texas State Capitol because he found that the State "intended the *** nonreligious aspects of the tablets' message to predominate" and

because, in context, the display in fact "communicates *** a secular message." 545 U.S. at 701 (Breyer, J., concurring in judgment). The dissenters in *Van Orden* and the majority in *McCreary* likewise found that there are "any number of perfectly constitutional depictions" of the Commandments, where context indicates that the government lacks a "religious purpose" and the display does not convey a "religious message." *Id.* at 740-741 (Souter, J., dissenting); *see McCreary*, 545 U.S. at 873-874 (explaining that "there is no risk" that the Ten Commandments in the frieze of this Court "would strike an observer as evidence that the National Government was violating neutrality in religion"). And while disagreeing that a predominantly secular purpose and meaning are *required*, the plurality in *Van Orden* and the dissenters in *McCreary* had no doubt that a display of the Commandments is constitutional where the government lacks "a primarily religious purpose" and the display conveys the Commandments' "historical meaning." *Van Orden*, 545 U.S. at 690-691 & n.11 (plurality); *see McCreary*, 545 U.S. at 905 (Scalia, dissenting).

Other passive display cases dating back decades have agreed on this constitutional minimum. In *Lynch*, the Court upheld a city's display of a crèche during the holiday season because it found the government's "purpose" and the "primary effect" of the display was "to depict the origins of [the Christmas] Holiday." 465 U.S. at 680-681. In *Allegheny*, the Court upheld the display of a menorah in a county holiday display because, in context, the purpose of the display and its objective meaning was to convey a message of pluralism and acknowledgment of the winter holidays. 492 U.S. at 616 (opin-

ion of Blackmun, J.); *id.* at 634 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 663 (Kennedy, J., concurring in judgment in part and dissenting in part). And in *Buono*, the plurality held that the lower courts erred in compelling the removal of a 76-year-old cross-shaped World War I monument because, it explained, that cross was not erected "to promote a Christian message" and because it did not serve "merely as a reaffirmation of Christian beliefs" but as "a symbol * * * to honor and respect" the war dead. 559 U.S. at 715-716, 721 (plurality); *see also id.* at 747 n.7 (Stevens, J., dissenting) (suggesting that a cross may constitutionally be used as "one part of a more elaborate monument that, taken as a whole, may be understood to convey a primarily nonreligious message").

In addition to agreeing on the bedrock principle that governments may constitutionally display religious symbols for a secular purpose and to convey a secular message, Members of the Court have also agreed that, in evaluating purpose and meaning, courts must take into account the full "context" of a display. *See Lynch*, 465 U.S. at 679; *Buono*, 559 U.S. at 721 (plurality); *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in judgment); *see also McCreary*, 545 U.S. at 905 (Scalia, J., dissenting) (Ten Commandments display must be understood in light of "context"); *Allegheny*, 492 U.S. at 666 (Kennedy, J., concurring in judgment in part and dissenting in part) (crèche must be interpreted in light of "relevant context"). That context is not limited to the display's aesthetic details or its immediate surroundings. Rather, it includes the full range of considerations relevant to understanding the meaning the government conveys through the monument, including the

social meaning of the symbol being used, the circumstances surrounding its placement, the monument's physical setting, and its history. *See Pleasant Grove City* v. *Summum*, 555 U.S. 460, 474-477 (2009).

For example, in order to assess the purpose and meaning of the government's maintenance of the monument in *Van Orden*, Justice Breyer looked to a range of factors beyond the symbolism of the monument itself. In particular, he observed that (1) the Ten Commandments are often displayed to convey "not simply a religious message[,] but also a secular moral message" and "a historical message"; (2) the face of the monument and the "circumstances surrounding [its] placement on the capitol grounds" indicated its designers' "ethics-based" message; (3) the "physical setting" of the monument, particularly its placement in a park containing other monuments celebrating the "historical 'ideals' of Texans," caused "the display's moral message * * * to predominate"; and (4) "40 years passed in which the presence of the monument, legally speaking went unchallenged," suggesting that few individuals had in fact "understood the monument as amounting * * * to a government effort to favor a particular religious sect." 545 U.S. at 701-702 (Breyer, J., concurring in judgment). Taken together, Justice Breyer concluded, these contextual considerations made clear that "the State itself intended the * * * nonreligious aspects of the tablets' message to predominate," and that for over 40 years, "that has been its effect." *Id.* at 701.

The *Buono* plurality considered a very similar set of factors in reaching its holding. In that case, the district court and the Ninth Circuit had invalidated

the cross monument, along with a federal statute Congress enacted to preserve it, on the ground that the Latin cross is a Christian symbol. 559 U.S. at 708-711 (plurality). A plurality of this Court held that this reasoning "took insufficient account of the context" surrounding the cross and the statute. *Id.* at 715; *see id.* at 721. And it pointed specifically to many of the same contextual considerations relied on by Justice Breyer in *Van Orden*, observing that (1) the Latin cross is "a symbol often used to honor and respect" the war dead, and "not merely a reaffirmation of Christian beliefs," *id.* at 721; (2) "those who erected the cross intended simply to honor our Nation's fallen soldiers," as reflected by the inclusion of a Veterans of Foreign Wars insignia on the cross itself, *id.* at 715; and (3) after "seven decades," "time also ha[d] played its role" in giving the cross a "historical meaning" as a "national memorial" to those "killed or wounded in World War I," *id.* at 716 (citing *Van Orden*, 545 U.S. at 702-703 (Breyer, J., concurring in judgment)). In light of these considerations, the plurality held, it was erroneous to conclude that the cross was erected in "an attempt to set the *imprimatur* of the state on a particular creed" or to "promote a Christian message." *Id.* at 715.

Importantly, none of the Court's opinions have looked at a display from the perspective of a "casual passerby." *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in judgment). As the *Buono* plurality explained, the objective meaning of a display and the government's purpose in maintaining it must be assessed from the perspective of someone "who knows *all* of the pertinent facts and circumstances surrounding the symbol and its

placement," and who considers the monument "in the context of *all* relevant factors." 545 U.S. at 721 (emphases added) (citing *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in judgment); *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in judgment)). That ordinarily requires analysis of the varied meanings of the symbol being used, and the display's origin, setting, and context. The fact that a person unaware of these facts may *misunderstand* the Government's purpose or the meaning of a display does not render it unconstitutional.

In short, while the Court has disagreed as to the particular ways that the purpose and meaning of a display should be weighed in considering an Establishment Clause challenge, it has reached broad agreement on two principles: A display does not violate the Establishment Clause where the Government's purpose and the display's objective meaning are both secular; and in evaluating purpose and meaning, a court must consider the full context of the monument, not merely the religious meaning of the symbol the monument uses.

b. The Court has also identified a second, independently sufficient ground for finding that a passive display is constitutional. As the Court has repeatedly explained, "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Town of Greece*, 572 U.S. at 576 (quoting *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part)). Where a government practice has long been engaged in without significant controversy, that "show[s] that" it can "coexis[t] with the principles of

disestablishment and religious freedom" that the Clause protects. *Id.* at 576, 578. Indeed, the very longevity of a practice often shapes its meaning, leading it to be understood as a way of honoring what is worth valuing in society rather than establishing religion. *See id.* at 583-584; *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment). Thus, "where history shows that [a] specific practice is permitted," it is "not necessary to define the precise boundary of the Establishment Clause"; history alone is powerful evidence that it is constitutional. *Town of Greece*, 572 U.S. at 577; *see also Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgement in part and dissenting in part).

Accordingly, the Court has repeatedly upheld displays and practices on finding that they are deeply rooted in our Nation's history and traditions. In *Lynch*, the Court upheld the display of the crèche in part because it fit within a long history of "official acknowledgments *** of the role of religion in American life" and "other forms of taking official note of Christmas." 465 U.S. at 674, 686. In *Marsh* v. *Chambers*, 463 U.S. 783 (1983), and *Town of Greece*, the Court held that the practice of opening legislative meetings with a prayer is constitutional because, after 200 years, such prayers have "become part of the fabric of our society." *Town of Greece*, 572 U.S. at 576 (quoting *Marsh*, 463 U.S. at 792); *see id.* at 616, 622 (Kagan, J., dissenting) (agreeing that *Marsh* was correctly decided and that "legislative prayer has a distinctive constitutional warrant by virtue of tradition"). Other decisions have made clear that practices dating back even a few decades—including the use of the phrase "In God We Trust" on the Nation's currency, or this Court's practice of opening its

sessions with the phrase "God Save * * * this Honorable Court"—are plainly constitutional. *Marsh*, 463 U.S. at 786; *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring); *see also Van Orden*, 545 U.S. at 688-689 (plurality); *Newdow*, 542 U.S. at 35-36 (O'Connor, J., concurring in judgment); *Newdow* v. *Roberts*, 603 F.3d 1002, 1017 & n.3 (D.C. Cir. 2010) (Kavanaugh, J., concurring in judgment) (observing that the Court has held that prayer practices "'deeply embedded in the history and traditions of this country'" are typically constitutional, and that "[t]he Court's religious display cases have followed [a similar] approach" (quoting *Marsh*, 463 U.S. at 786)).

Of course, history and tradition are not dispositive in every circumstance. It may be that a practice, although longstanding, has often been employed to proselytize or denigrate non-adherents. *Town of Greece*, 572 U.S. at 582-583. And a specific practice may vary from tradition in a way that removes it from that tradition's protective ambit—for instance, by involving explicit calls to prayer or intrusive sectarian content. *Id.* at 582-585 (majority opinion); *id.* at 588-89 (plurality); *see also id.* at 629 (Kagan, J., dissenting). But where a display maps closely on to a history of displays that have been erected and maintained without meaningful controversy for an extended period, that is reason enough to conclude that it does not pose a meaningful threat of religious establishment.

B. The Peace Cross Is Constitutional.

Both of those approaches easily resolve this case. For 93 years, the Peace Cross has stood as a monument to the residents of Prince George's County who perished in World War I. Every conceivable contex-

tual consideration confirms that the government's purpose in maintaining the monument and its objective meaning are secular. And the Peace Cross fits within an unbroken, centuries-old history of using the cross as an official symbol of sacrifice and martial valor. For each of these reasons, together and independently, the monument complies with the Establishment Clause's strictures.

1. The purpose and objective meaning of the Peace Cross are secular.

The context of the Peace Cross plainly conveys its secular purpose and meaning. The usage of the cross as a symbol of the World War I dead, the inscriptions on the face of the display, the setting in Veterans Memorial Park, and the 93-year history—all make clear that the purpose and objective meaning of this monument are to commemorate war dead and to honor the Nation's veterans. And the passage of time has not only deepened that message, but also given the monument a secondary meaning as a historic landmark.

First, the symbol that the monument employs—the Latin cross—is one that can convey "not simply a religious message, but a secular message as well." *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in judgment); *see Buono*, 559 U.S. at 721 (plurality). As the plurality explained in *Buono*, when used in the context of a war memorial, "a Latin cross is not merely a reaffirmation of Christian beliefs"; it "evokes *far more* than religion" as "a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its

people." 559 U.S. at 721 (plurality) (emphasis added).

That meaning of the Latin cross as a symbol of commemoration and loss was especially well-established in the immediate aftermath of World War I. Poetry, photographs, visual art, and other monuments across the country used the Latin cross as a universal symbol of the sacrifices of those who fought and died. John McCrae's "In Flanders Fields," the novel *The Four Horsemen of the Apocalypse*, the crosses erected at Arlington National Cemetery and the St. Mihiel American Cemetery, and hundreds of similar Crosses of Sacrifice in Commonwealth countries' World War I cemeteries reflect this well-known meaning. *See supra* pp. 4-9. Congress itself has recognized that meaning in multiple enactments. *See* Consolidated Appropriations Act, 2005, Pub. L. No. 108–447, div. J, tit. I, § 116(a), 118 Stat. 2809, 3346; Department of Defense Appropriations Act, 2002, div. A, tit. VIII, § 8137(a), 115 Stat. at 2278; H.R. Res. 16, 68th Cong., at 1 (1924) (at JA 1163-64).

The Fourth Circuit majority rejected the complex historical and cultural meaning of a cross as a symbol of World War I sacrifice by reducing it to a single meaning. In its view, the Latin cross is "exclusively a Christian symbol," one that "only holds value as a symbol of death and resurrection *because* of its affiliation with the crucifixion of Jesus Christ." Pet. App. 20a-21a (internal quotation marks omitted). That simplistic analysis was mistaken, root and branch. The Fourth Circuit's apparent belief that a symbol with religious associations can never take on secular meanings was not only rejected by this Court

in *Buono* in the specific context of a cross used to commemorate World War I sacrifice, 559 U.S. at 721 (plurality)—it is irreconcilable with this Court's Establishment Clause jurisprudence more broadly. The Court has time and again held that symbols and words that take meaning from religion may also convey secular messages. Indeed, *every* member of the *Van Orden* court recognized that a government display of the Ten Commandments may be a permissible representation of law, even though its meaning as a symbol of law derives entirely from its religious origins. *See supra* pp. 26-27.

That conclusion follows from common sense. Few symbols, least of all the cross, are "exclusively" religious. Pet. App. 20a; *see Summum*, 555 U.S. at 474 ("[t]he meaning conveyed by a monument is generally not a simple one"). The simple shape of the cross has had numerous uses and meanings throughout history: as a crude Roman instrument of execution, as a marker of gravestones, as a sign of sacrifice, as a medal of valor, and as a prominent symbol of Christianity. Cultural context shapes what objects and symbols mean at particular times and places. The use of the cross in our Nation's cultural history makes plain that it holds a significant secular meaning to commemorate valor and sacrifice, especially when associated with the First World War.[10]

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[10] That is not to suggest that the cross must cease to have any religious meaning to be displayed. *See, e.g.*, *Allegheny*, 492 U.S. at 634 (O'Connor, J., concurring) (a menorah display need not be "devoid of any religious significance" to be permissible). The relevant question under the Establishment Clause is what

Second, the face of the monument and the "circumstances surrounding [its] placement" make plain that the Peace Cross was erected to convey a commemorative message. *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in judgment); *see Buono*, 559 U.S. at 715 (plurality). A plaque at the base of the Peace Cross dedicates the monument to "the heroes of Prince George's County Maryland who lost their lives in the Great War for the liberty of the world" and lists the names of the 49 local men who fell. Pet. App. 55a; *cf. Allegheny*, 492 U.S. at 619 (opinion of Blackmun, J.) (relying on display's "explanatory plaque"). An inscription on the face of the monument enshrines President Wilson's statement that "[t]he right is more precious than peace." Pet. App. 44a. Each face of the monument honors a universal civic value: "valor; endurance; courage; devotion." Pet. App. 55a. These inscriptions speak with a single consistent voice, one wholly without religious content: They mark the cross as a symbol of respect for the war dead and the cause for which they died.

The circumstances surrounding the placement of the Cross reaffirm that it was erected to convey this meaning. The organizers of the monument were a group of bereaved mothers and private citizens whose avowed purpose was to commemorate those "who gave their all in the World War to make the world safe for democracy." *Id.* The ground for the

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message the *government* sends by displaying or maintaining that symbol. It may utilize the idioms of religious traditions to convey a secular message—such as war commemoration—even if some observers may still draw religious significance from them. *See Town of Greece*, 572 U.S. at 582-583.

monument was broken by the mother of the first soldier from Prince George's County to die in the war, and another mother of a soldier memorialized by the cross soon after wrote: "I feel that our memorial cross is, in a way, his grave stone." JA 989; *see also* JA 937 & n.11. When construction of the cross stalled in 1922, the American Legion—a civic veterans service organization chartered by Congress, Pet. App. 39a—assumed responsibility for the land and completed the monument. Pet. App. 57a–58a; JA 906, 910-911.

These "[p]rivate citizens" erected the cross "to commemorate American servicemen who had died in World War I," not to convey a Christian message. *Buono*, 559 U.S. at 715 (plurality). It is true that one private fundraising document and a speaker at the groundbreaking ceremony made brief allusions to religion. *See* Pet. App. 6a-7a, 55a-56a. But these religious references—hardly uncommon at the time—were dramatically outnumbered by the contemporaneous statements describing the cross and its purposes in exclusively secular terms. *See, e.g.*, Pet. App. 56a-57a; *cf. Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in judgment) (noting that the private organization that donated the monument was "interested in the religious aspect of the Ten Commandments" but had a "primarily secular" objective).

Furthermore, when the Commission assumed ownership of the monument in 1960, the civic goals of those who erected the cross retained central prominence. The center of the cross prominently bears the symbol of the American Legion. *See* JA 929-931; *cf. Van Orden*, 454 U.S. at 701–702 (Breyer, J., concur-

ring in judgment) (monument "prominently acknowledge[s] that [a private organization] donated the display"); *Buono*, 559 U.S. at 715, 722 (plurality) (monument bears symbol of Veterans of Foreign Wars). And in the instruments relinquishing any remaining property interest it had in the monument, the American Legion expressed that it reserved the right to use the monument in perpetuity for commemorative events, as it has in fact done for decades. JA 1384-87; *see also* Pet. App. 60a.

Third, the "physical setting of the monument" reinforces its meaning as a secular war memorial. *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment). Since the Peace Cross was erected, the community has surrounded it with other monuments to those who fell in our Nation's conflicts, in an area now known as Veterans Memorial Park. Pet. App. 60a, 102a. In 1944, local American Legion posts erected a stone scroll across the street from the Peace Cross to honor individuals who died in World War II. Pet. App. 60a. In 1983, a monument was added to honor veterans of the Korean and Vietnam Wars. Pet. App. 60a-61a. Other monuments in the park commemorate the victims of the attack on Pearl Harbor, individuals who died on September 11, 2001, and American forces that defended the Nation's capital in the Battle of Bladensburg during the War of 1812. Pet. App. 60a–61a, 102a. As the Court has repeatedly observed, the addition of nearby monuments bearing a consistent theme strongly communicates what message the government wishes a monument to convey. *See Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in judgment); *see also Summum*, 555 U.S. at 477; *Allegheny*, 492 U.S. at 614 (opinion of Blackmun, J.); *Lynch*, 465 U.S. at 692

(O'Connor, J., concurring). Here, that message is one of patriotic commemoration and respect for the fallen.

Other features of the monument's physical setting confirm that commemorative message. An American flag flies immediately adjacent to the monument. A nearby "[t]rail marker" constructed by the National Park Service describes the monument as "a place for communities to commemorate the residents in service and in death." JA 902. Furthermore, the area surrounding the monument—a busy highway median—conveys "little or nothing of the sacred" and "does not readily lend itself to * * * religious activity." *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment). And the monument is not located in a sensitive place, like a school or a civic building, in which Establishment Clause concerns are at their peak. *See Town of Greece*, 572 U.S. at 590 (plurality); *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in judgment); *id.* at 690-691 (plurality).

The Fourth Circuit deemed it significant that the Peace Cross is "the most prominent monument in the area." Pet. App. 24a. But the size of the memorial simply conveys *how* the builders wished the cross's message conveyed—that is, prominently—not what the message actually is. *Cf. Davenport*, 637 F.3d at 1106 (Kelly, J., dissenting from denial of petition for rehearing) (large size of memorial merely ensured observers would "take notice of the display and absorb its message"). Furthermore, the size of the monument is in part just a function of the fact that, when erected, the Peace Cross marked the terminus of a lengthy new road connecting Bladensburg to

Annapolis, whereas the surrounding area has developed substantially since then. *See* JA 431, 433.

Fourth, "[t]ime also has played its role" in confirming the secular meaning of the Peace Cross. *Buono*, 559 U.S. at 716 (plurality); *see Van Orden*, 545 U.S. at 702-703 (Breyer, J., concurring in judgment). The Peace Cross was erected in 1925. In the 93 years that have passed since, the Peace Cross has been used regularly and consistently as a site for mourning and honoring the Nation's veterans. *Cf. Buono*, 559 U.S. at 716 (plurality). Year in and year out since the monument's construction, the community has held annual Veterans Day and Memorial Day events at the site and the neighboring war memorials. Pet. App. 61a-62a; *see e.g.*, JA 235-273, 541-612. Apart from a single newspaper advertisement in 1931, there is no evidence the cross has ever been used as a site of a religious service of any kind. Pet. App. 62a.[11] Throughout its long history, "the cross and the cause it commemorate[s]" have "become entwined in the public consciousness." *Buono*, 559 U.S. at 716 (plurality).

The Peace Cross has also acquired a secondary meaning during this period: as a historic landmark and symbol of the local community. The Peace Cross records for history the way that members of the community responded to a traumatic event in the life

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[11] The Fourth Circuit's suggestion that the benedictions and invocations at veterans services amount to "group prayers" was incorrect. The Court has made clear that non-proselytizing prayers of this nature—which have long been common at veterans' events throughout the country—are compatible with the Establishment Clause. *See Town of Greece*, 572 U.S. at 581.

of the Nation. *See* JA 988-991. It conveys the meaning individuals drew from World War I, the values they thought the war represented, and the way they wished to honor those they lost. JA 216-217, 937-938, 988-991, 1127, 1143. It is a snapshot of a moment in time and an enduring link with the past. *See* Pet. App. 99a-100a (Wilkinson, J., dissenting from denial of rehearing en banc); *cf. Am. Atheists, Inc.* v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 241 (2d Cir. 2014).

Over time, the Peace Cross has also become an architecturally and aesthetically significant monument. It was designed and constructed by the sculptor John Joseph Earley, an innovator in concrete and an early figure in the Art Deco movement. *See* JA 906, 909; *see generally* Lori Renée Aument, Experimentation in Concrete: John J. Earley at Meridian Hill Park, Washington, DC: History, Technology, and Characterization of Exposed Aggregate Concrete (1999) (unpublished M.S. thesis, University of Pennsylvania).[12] The Peace Cross is "an early example" of Earley's use of concrete, previously considered a utilitarian construction material, to create a colorful and visually striking work of art. JA 906. It reflects a nationwide turning point in how war memorials were built, breaking with the traditional style of using sculptural representations of a single person, in order to "democratize war memorials" by using a symbolic representation of the community at large. JA 912; *see also* JA 958.

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[12] *Available at* https://repository.upenn.edu/cgi/viewcontent.cgi?article=1348&context=hp_theses.

Both the local and the federal government have recognized the monument's historic significance. The National Park Service placed the Peace Cross on the National Register of Historic Places in 2015, and Prince George's County has protected the Cross through local historic preservation laws since 2010. JA 1599-1601; *see also* JA 969-985. When the Commission acquired the monument over 50 years ago, its principal aim was to preserve the monument in perpetuity as a landmark; since then it has repeatedly engaged in preservation efforts designed to reflect and preserve its historic value. *See, e.g.*, JA 308, 418, 906-907, 1387.

By retaining the monument after 93 years, then, the Commission conveys not only a message of respect for the fallen; it conveys a respect for history. No interpretation of the Establishment Clause "require[s] governments to hide works of art or historic memorabilia from public view" or tear down a monument, like this one, that has "become an important feature of a familiar landscape or a reminder of an important event in the history of a community." *Van Orden*, 545 U.S. at 711 (Stevens, J., dissenting). Otherwise the federal government would be required to divest ownership or cease financial support of numerous structures and artistic works it has long been responsible for preserving.[13]

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[13] *See, e.g.*, Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church, 27 Op. O.L.C. 91 (2003) (Park Service grant to preserve still-active Old North Church in Boston); *Martin Luther King Jr. National Historic Park: Ebenezer Baptist Church*, Nat'l Park Serv.,

A final aspect of the monument's history is "determinative." *Id.* at 702 (Breyer, J., concurring in judgment). From the date the Peace Cross was first conceived in 1919 until this suit began, almost a century passed in which "the presence of this monument * * * went unchallenged." *Id.*; *see Buono*, 559 U.S. at 716 (plurality). Throughout that period, thousands passed the monument, including respondents. *See* JA 29-30, 666. But until the present dispute, there is no record that any person ever raised any concern that the monument improperly favored religion, described it as a representation of Christianity, or challenged it as establishing a religion. That time period, more than twice as long as the period in *Van Orden*, "suggest[s] more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting * * * to a government effort to favor a particular religious sect." 545 U.S. at 702 (Breyer, J., concurring in judgment).

2. *The Peace Cross fits in a long history and tradition of displaying crosses as symbols of sacrifice and military valor.*

History and tradition independently support the conclusion that the Peace Cross is constitutional. As the Court explained in *Town of Greece*, where history shows that "the specific practice" being challenged has "withstood the critical scrutiny of time and

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https://www.nps.gov/malu/planyourvisit/ebenezer_baptist_church.htm (last visited Dec. 16, 2018) (National Park Service maintenance of church where Martin Luther King, Jr. was baptized and began preaching).

political change," the Court rarely need look further to confirm that it complies with the Establishment Clause's call for religious neutrality. 572 U.S. at 577. For more than 200 years, crosses have been used as symbols of sacrifice and military valor, and similar monuments have dotted the Nation's landscape since before its Founding. This monument fits well within that tradition and is thus constitutional on that basis alone.

When European settlers arrived in North America, they brought with them the European tradition of using the cross as a "symbol of sacrifice" and an "emblem for valor and bravery." *See* George Willard Benson, The Cross: Its History and Symbolism 57 (1934). From the beginning, the North American settlers and colonists used crosses to commemorate difficult episodes. In April 1607, the Jamestown colonists who landed in what would become the first permanent English settlement in America erected a wooden Latin cross to give thanks for a successful crossing.[14] In 1688, Father Pierre Millet erected a cross at Fort Niagara, in what would become Youngstown, New York, to honor the men who manned the fort during a punishing winter when 88 starved to death.[15] In 1785, the Acadians, a group of

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[14] S. J. Res. 243, 75th Cong. (1938); *Cape Henry Memorial: The beginning and end of British America has roots on these windswept sands*, Nat'l Park Serv., https://www.nps.gov/came/index.htm (last visited Dec. 16, 2018).

[15] Thor Borresen, *Father Millet Cross: America's Smallest National Monument*, 3 Regional Rev. 1 (1939), *available at* https://web.archive.org/web/20080726175911/http://www.nps.gov/history/history/online_books/regional_review/vol3-1e.htm.

French-Canadian settlers who had been displaced by British Loyalists resettling in Canada, erected a cross to give thanks when they arrived safely in modern-day Maine.[16]

Americans continued to use the symbol of the cross during and after the Nation's Founding. The first flag of the United States, the Grand Union Flag, which George Washington raised on Prospect Hill during the siege of Boston, included a cross. *See* Michael Corcoran, For Which It Stands, An Anecdotal Biography of the American Flag 27-28, 33-34 (2002). In the Civil War, the Union Army used crosses to identify various corps and to commemorate their losses.[17] When soldiers from those corps died, the memorials erected to honor them often included the crosses of their corps. *See, e.g.*, Tom Huntington, Guide to Gettysburg Battlefield Monuments 19, 47, 68, 78, 114, 118 (2013). All told, at least 114 such Civil War monuments were erected that bore a cross, including the 142nd Pennsylvania Infantry Monument and the Irish Brigade Monument at Gettysburg. *See id.* at 86, 129; *Trunk* v. *City of San Diego*, 660 F.3d 1091, 1099–100 (9th Cir. 2011) (Bea, J., dissenting from denial of rehearing en banc).

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[16] *See National Register of Historic Places Inventory-Nomination Form: Acadian Landing Site-St. John Valley, 1785*, Nat'l Park Serv. (Sept. 20, 1973), https://npgallery.nps.gov/NRHP/GetAsset/NRHP/73000098_text.

[17] The 5th and 6th Corps of the Union Army both employed cross symbols. *See* Frank C. Foster, United States Army Medals, Badges and Insignias 9 (2011).

In the late nineteenth and early twentieth centuries, the use of crosses to honor the contributions of American servicemen and to memorialize the dead became increasingly widespread. In 1890, the Naval Academy Cemetery erected a Latin cross in honor of sailors who died during an Arctic expedition of 1881. *Kondrat'yev* v. *City of Pensacola*, 903 F.3d 1169, 1181 (11th Cir. 2018) (Newsom, J., concurring in judgment), *petition for cert. docketed*, No. 18-351 (U.S. Sept. 18, 2018). In 1901, women in Georgia erected a memorial cross to mark the site of Fort Augusta, an American stronghold during the French and Indian War and later the site of a key battle of the American Revolution. Edith Hamilton Daly, 14 J. of the Am. Irish Historical Society 196 (1915). And in the wake of World War I, the cross became the central symbol of wartime sacrifice and loss, and cross memorials proliferated in communities and cemeteries across the United States. *See supra* pp. 6-9.

Throughout the twentieth century and up to the present day, American communities have continued to honor the collective sacrifices of the war dead by erecting memorial crosses. In 1926, a wooden cross was erected in Yorktown, Virginia to commemorate French soldiers who died in the last battle of the Revolutionary War. Marcel Villanueva, The French Contribution to the Founding of the United States 120 (1975). The people of Woonsocket, Rhode Island erected a cross to honor locals who died in World Wars I and II.[18] The town of Rochester, New York

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[18] *See* Press Release, Rhode Island Office of Att'y Gen., *AG Kilmartin Applauds Woonsocket for Actions to Defend the WWI*

erected a cross to commemorate residents who fought and fell in World War I, World War II, Korea, and Vietnam.[19] In 2004, marines in California erected unadorned, wooden crosses to honor friends lost in the war on terror.[20] Across the country, many communities hold "white cross ceremonies" where they erect unadorned white crosses to honor fallen veterans.[21]

Furthermore, Congress has expressly recognized and honored the use of crosses as secular symbols to commemorate the Nation's fallen. It repeatedly gave recognition to the cross as a symbol of World War I, including by authorizing multiple medals for valor in

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& WWII Monument (May 2, 2012), *available at* https://www.ri.gov/press/view/16435.

[19] *See East Rochester's Forever Young Memorial*, Nat'l War Mem'l Registry, https://www.nationalwarmemorialregistry.org/joomla/war-memorial-registry-search/new-york/east-rochester-s-forever-young-memorial (last visited Dec. 16, 2018).

[20] *See* Gretel C. Kovach, *Marines Hike Memorial Hill*, San Diego Union-Trib. (July 19, 2014, 2:47 PM), https://www.sandiegouniontribune.com/military/sdut-marines-hill-memorial-cross-matthew-abbate-2014jul19-story.html.

[21] *See, e.g.*, Julia Sarcinelli, *Fitchburg's White Cross Ceremony honors fallen heroes*, Sentinel & Enterprise News (May 28, 2018, 7:02 AM), http://www.sentinelandenterprise.com/news/ci_31906752/fitchburgs-white-cross-ceremony-honors-fallen-heroes (Fitchburg, Massachusetts); Douglas White, *'It puts a lump in your throat' Memorial crosses going up in Central Park*, The Gleaner (May 11, 2017, 3:37 PM), https://www.thegleaner.com/story/news/2017/05/11/puts-lump-your-throat-memorial-crosses-going-up-central-park/101427194/ (Henderson, Kentucky).

the shape of crosses and approving of the continued use of cross-shaped grave markers in Europe to replace the temporary wooden crosses. *See supra* pp. 5-6. In recent decades, it has enacted multiple statutes recognizing and seeking to preserve cross memorials as national monuments to the war dead. *See* Preservation of Mt. Soledad Veterans Memorial, Pub. L. No. 109-272, 120 Stat. 770 (2006); Department of Defense Appropriations Act, 2002, div. A, tit. VIII, § 8137(a), 115 Stat. at 2278; Consolidated Appropriations Act, 2005, div. J, tit. I, § 116(a), 118 Stat. at 3346.

The Establishment Clause should be interpreted and applied in light of this longstanding tradition. Memorial crosses have been erected since long before the Nation's Founding, and have continued to be built and maintained up to the present. That history makes it unlikely that those who drafted the First Amendment thought that this custom could not "coexist[ ] with the principles of disestablishment and religious freedom." *Marsh*, 463 U.S. at 786. And the enduring use of the Latin cross in countless government practices since then—in military medals, monuments to the war dead, local veterans ceremonies, and federal statutes—suggests that, as this country's religious diversity has grown, the use of the cross as a symbol of sacrifice has not become seen as a means of aligning the government with one faith or endorsing a particular creed. *See Town of Greece*, 572 U.S. at 578.

Indeed, the tradition of using crosses as symbols of commemoration is at least as venerable as the traditions on which this Court's precedents have previously relied. In *Town of Greece*, the Court noted that

the tradition of state legislative prayer considered in *Marsh* had "persisted" "for more than a century," and it found that local legislative prayer "has historical precedent" by citing a pair of examples from 1909 and 1910. *Id.* at 576. In *Van Orden*, the plurality identified the "role played by the Ten Commandments in our Nation's heritage" by looking to a handful of examples, including ones dating from 1897 and 1935. 545 U.S. at 688-689 (plurality). The tradition of using crosses as commemorative symbols is far longer: It dates to well before the Founding and has been widespread at least since the Civil War.

The Peace Cross fits easily within this tradition. *See Town of Greece*, 572 U.S. at 577. Like the crosses at Cape Henry and Yorktown, it was erected in the simple shape of a cross, and seeks to commemorate noble achievements and heroic sacrifices. No aspect of this monument "proselytize[s]," "threaten[s] damnation," or "denigrate[s] nonbelievers." *Id.* at 583-584. On the contrary, the Peace Cross contains conspicuously more indicia of its universal message than many of the Nation's most cherished cross monuments, including the simple crosses at Arlington and the "unadorned cross" on Sunrise Rock that Congress enacted a statute to save.

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The two approaches the Court has widely agreed on as bases for affirming a monument's constitutionality thus lead decisively to the same conclusion here: The purpose and objective meaning of the Peace Cross are plainly secular, and the Cross fits within a long history and tradition of using crosses to commemorate loss and signify martial valor. That is

enough to conclude that it complies with the Establishment Clause twice over.

Indeed, *Van Orden* and *Buono* all but dictate that conclusion. Every consideration on which Justice Breyer relied in finding the Ten Commandments monument constitutional in *Van Orden* is present here: the use of a religious symbol that also bears a "secular" and "historical" meaning; the erection of the monument by a civic group to convey an ethical message; the location of the monument in a park dedicated to a common secular theme; and the decades that the display has stood without challenge. 545 U.S. at 701-702 (Breyer, J., concurring in judgment); *see* Pet. App. 104a-105a (Niemeyer, J., dissenting from denial of rehearing en banc). In nearly every respect, this is an *a fortiori* case. The Peace Cross, unlike the Texas monument, includes multiple express declarations of its secular purpose on its face, has been supported by 93 years of unbroken practice, and does not contain text explicitly "invoking * * * the Deity" or prescribing principles of religious observance. *Van Orden*, 545 U.S. at 700-703 (Breyer, J., concurring in judgment).

The message conveyed by this monument is also more clearly secular than the one at issue in *Buono*. The war memorial under review there was a "bare, unadorned cross" "at an isolated location in the desert" that had sometimes been used for Easter services, *Buono*, 559 U.S. at 759 (Stevens, J., dissenting), but the plurality nonetheless found that lower courts erred in assigning it a predominantly religious meaning, *id.* at 715-716 (plurality). It follows that the same is true here, given the numerous indicia of the monument's secular meaning and the absence of

virtually any record of religious practice. Indeed, even the dissenters in *Buono* suggested that a monument just like this one—a cross used as part of a "more elaborate" memorial—could pass muster. *Id.* at 747 n.7 (Stevens, J., dissenting).

Concluding that the Peace Cross is unconstitutional, by contrast, would provoke "the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in judgment). It would require the disfigurement or removal of a monument that has honored the war dead and served as a place of civic unity for nearly a century. That destructive act would inevitably be interpreted as a sign of shocking disrespect for the brave souls whom the memorial commemorates, and for the thousands of veterans whom it has been used for decades to celebrate. It would be seen by many not as a sign of a government committed to religious neutrality, but of one "bent on eliminating from all public places * * * any trace of our country's religious heritage." *Buono*, 559 U.S. at 726 (Alito, J., concurring in part and concurring in judgment).

What is more, the removal of the Peace Cross would inevitably require the destruction of other cross-shaped memorials throughout the country. If the Peace Cross must fall, despite being marked with numerous indications of its secular meaning, then the far simpler crosses in nearby Arlington National Cemetery cannot survive. Nor can the hundreds of other war memorials that have long stood at Gettysburg, Cape Henry, Acadia Landing, and elsewhere. Affirming the invalidation of the Peace Cross would "encourage disputes concerning the removal of

longstanding [memorials] * * * across the Nation," and compel the elimination of a national commemorative tradition. *Van Orden*, 545 U.S. at 705 (Breyer, J., concurring in judgment).

The Fourth Circuit itself recognized this risk but reserved the question whether the crosses in Arlington, at least, would meet destruction. Pet. App. 29a. It suggested that those memorials could potentially be distinguished because they are smaller, they appear in "a designated area for commemorating and memorializing veterans," and Arlington uses diverse religious symbols for its individual grave markers. *Id.* Those distinctions are empty. The Argonne Cross and Canadian Cross of Sacrifice are between 13 and 24 feet high, substantially "talle[r]" than the surrounding monuments. Pet. App. 24a. Veterans Memorial Park serves the same role for Prince George's County as a place for "commemorating and memorializing veterans" as Arlington National Cemetery does for the Nation. And the notion that *more* religious symbolism would have saved the Peace Cross from invalidity under the Establishment Clause is absurd. If anything, the addition of overtly sectarian monuments nearby would have indicated—contrary to fact—that the Peace Cross commemorates Christian veterans alone, sending precisely the sort of divisive message the Establishment Clause disfavors.

The Peace Cross, and numerous monuments like it, fit comfortably within the Nation's traditions and our Constitution's commitment to religious neutrality. The Court should "let the cross remain and let those honored rest in peace." Pet. App. 100a (Wilkinson, J., dissenting from denial of rehearing en banc).

C. The Peace Cross Is Also Constitutional Under The *Lemon* Test.

The Court need go no further to uphold the Peace Cross. Although the Fourth Circuit "s[aw] fit to apply *Lemon*" in analyzing the monument, Pet. App. 17a, this Court has long explained that *Lemon* provides at most "useful" guideposts in evaluating passive displays. *Lynch*, 465 U.S. at 679. In *Van Orden*, a majority of the Court expressly declined to apply *Lemon* to the Ten Commandments display at issue. *See Van Orden*, 545 U.S. at 685-686 (plurality); *id.* at 700 (Breyer, J., concurring in judgment). And other cases have similarly declined to apply *Lemon* where a more straightforward analysis dictated the result. *See Lynch*, 465 U.S. at 679 (giving examples). Where, as here, the uncontested principles of the Court's Establishment Clause precedents are sufficient to resolve the case, there is no need for courts to employ *Lemon*'s "formal * * * test[ ]." *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in judgment). Nor is there a need for the Court to decide "the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence." *Id.* at 686 (plurality).

Nonetheless, the same result would obtain under the *Lemon* test. That test provides that a challenged government action is constitutional if it (1) "ha[s] a secular purpose"; (2) "neither advance[s] nor inhibit[s] religion in its principal or primary effect"; and (3) does not "foster an excessive entanglement with religion." *Allegheny*, 492 U.S. at 592 (citing *Lemon*, 403 U.S. at 612-613). The Peace Cross easily surmounts each of those hurdles.

1. The Fourth Circuit acknowledged that "[t]he Commission has articulated legitimate secular purposes for displaying and maintaining the Cross." Pet. App. 19a. Rightly so. The record makes plain that the Commission acquired the Peace Cross to assure traffic safety and preserve the monument. *Id.*; *see* JA 1534-35. And over the course of decades, the Commission has maintained the monument for the purpose of honoring the soldiers who perished in World War I and preserving this historic landmark. Pet. App. 19a; *see* JA 418, 906-907, 1384-87. These purposes are both plainly legitimate and wholly secular.

2. The Peace Cross also does not have the "effect" of endorsing religion. As the Court has explained, *Lemon*'s "effect" prong asks whether a "reasonable observer" who is "familiar with the full history and context" of the challenged display would perceive it as an "endorsement" of religion. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 655 (2002). Critically, this prong "do[es] not ask whether there is *any* person who could find an endorsement of religion, whether *some* people might be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion." *Pinette*, 515 U.S. at 779-780 (O'Connor, J., concurring in part and concurring in judgment) (emphases and alterations in original; citation omitted). Rather, it seeks to determine "the 'objective' meaning" of the display, by asking whether "a personification of a community ideal of reasonable behavior"—someone who is "aware of the history and context of the community," and whose knowledge is not "limited to the information gleaned simply from viewing the challenged display"—would "perceive a governmental endorse-

ment" of religion. *Id.* (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); W. Keeton et al., Prosser and Keeton on Law of Torts 175 (5th ed. 1984)); *see Buono*, 559 U.S. at 721 (plurality) (endorsement test "requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding" a display).

For many of the reasons already given, a reasonable observer would not understand the Peace Cross to endorse any religion. A reasonable observer viewing the Peace Cross would be aware of the long history of using crosses as symbols of the World War I dead, and as symbols of sacrifice and military valor generally. *See Town of Greece*, 572 U.S. at 587 (plurality) ("[i]t is presumed that the reasonable observer is acquainted with th[e] tradition" of using legislative prayer as "part of our expressive idiom"). She would know the full content of the monument, including the dedication to the 49 men who perished, the quotation from President Wilson, the Legion symbol, and the inscriptions honoring "valor; endurance; courage; devotion." She would know that the monument was erected by the bereaved mothers of servicemen who perished in World War I and by the American Legion, and that for nine decades it has been used almost exclusively as a site for patriotic commemorative ceremonies. *Zelman*, 536 U.S. at 655 (reasonable observer aware of "full history" of display). And she would know that the Cross stands at the center of Veterans Memorial Park, surrounded by other secular memorials to the fallen of the Nation's conflicts. *See Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) ("setting changes what

viewers may fairly understand to be the purpose of the display").

Considering the monument in light of its "full history and context," the reasonable observer would thus conclude that the Peace Cross is—as it says—a memorial to the men who perished in World War I, not a statement of support for any particular religion. *Zelman*, 536 U.S. at 655. To be sure, the Peace Cross bears the shape of a religious symbol. But a reasonable observer, "fully aware of our national history and the origins of" the cross as a symbol of the World War I dead, would understand that the Peace Cross "employ[s] th[at] idiom for * * * secular purposes"—to "encourag[e] the recognition of what is worthy of appreciation in society" and to honor those who made the ultimate sacrifice. *Newdow*, 542 U.S. at 36 (O'Connor, J., concurring in judgment) (quoting *Lynch*, 465 U.S. at 692-693). And she would recognize that, after 93 years, the Commission also maintains the memorial in part to preserve a historic landmark, not to preach any part of Christian doctrine.

The Fourth Circuit reached a different conclusion only by severely misapplying the reasonable observer test. The panel reasoned that it could ignore several secularizing features of the monument and its setting—including the "plaque," the "Legion symbol," and the "surrounding monuments"—because "the Cross is located in a high-traffic area" in which "one could not easily park," because "passers-by" might fail to stop and examine the monument in its entirety, and because (after 93 years) some of those features are "weathered." Pet. App. 25a-26a. That is not how the reasonable observer test works. It

emphatically does not turn on the perceptions of "passersby" with a limited "degree[] of knowledge." *Pinette*, 515 U.S. at 779 (O'Connor, J., concurring in part and concurring in judgment); *see Buono*, 559 U.S. at 720-721 (plurality). It looks through the eyes of a "community ideal of reasonable[ness]," *Pinette*, 515 U.S. at 779-780 (O'Connor, J., concurring in part and concurring in judgment), someone who is aware of everything from the history of the Nation to the "legislative history" of a law under challenge, *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 308 (2000). That observer would not be stymied by the lack of parking and the height of the bushes.

3. Finally, the Peace Cross plainly does not "entangle" the government with religion. The concept of "entanglement" refers to a "comprehensive, discriminating, and continuing state surveillance" of religious activities. *Mueller* v. *Allen*, 463 U.S. 388, 403 (1983) (quoting *Lemon*, 403 U.S. at 619). The Commission's upkeep of the Peace Cross does not involve "surveill[ing]" religion at all, let alone "comprehensive[ly]" and "continu[ously]" doing so. The Fourth Circuit's holding to the contrary rested entirely on its view that the Peace Cross was being maintained as a Christian symbol. Pet. App. 30a-31a. But, for the reasons already given, that premise is incorrect, and the Fourth Circuit's entanglement analysis accordingly crumbles with it.

CONCLUSION

For the foregoing reasons, the judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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No. 18-18

IN THE
Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

THE PEACE CROSS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE 3

A. The Establishment Clause Does Not Categorically Prohibit Displaying A Cross As A Symbol Of Sacrifice And Loss 3

B. The Peace Cross Is Constitutional 8

1. The purpose and objective meaning of the Peace Cross are secular 8

2. The Peace Cross fits within an undisputed tradition of displaying crosses as symbols of sacrifice and military valor 16

3. Invalidating the Peace Cross would sow division and threaten hundreds of other monuments 20

C. The Court Should Not Revisit Its Longstanding Precedents Or Apply *Lemon* Here 23

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES:

Ashwander v. *Tenn. Valley Auth.*,
297 U.S. 288 (1936) 23

Capitol Square Review & Advisory Bd. v. *Pinette*,
515 U.S. 753 (1995) 5, 6

Committee for Public Education & Religious Liberty v. *Nyquist*,
413 U.S. 756 (1973) 18

Cty. of Allegheny v. *ACLU*,
492 U.S. 573 (1989) 4, 6, 7

Elk Grove Unified Sch. Dist. v. *Newdow*,
542 U.S. 1 (2004) 14, 19

Lemon v. *Kurtzman*,
403 U.S. 602 (1971) 23

Lynch v. *Donnelly*,
465 U.S. 668 (1984) 4, 5, 7

Marsh v. *Chambers*,
463 U.S. 783 (1983) 19

McCreary County v. *ACLU*,
545 U.S. 844 (2005) 5

Pleasant Grove City v. *Summum*,
555 U.S. 460 (2009) 5, 6, 8

Salazar v. *Buono*,
559 U.S. 700 (2010) ..... *passim*

State v. *West*,
263 A.2d 602 (Md. Ct. Spec. App. 1970) 16

Torcaso v. *Watkins*,
367 U.S. 488 (1961) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Town of Greece v. *Galloway*,
572 U.S. 565 (2014) ..... *passim*

Van Orden v. *Perry*,
545 U.S. 677 (2005) ..... *passim*

Walz v. *Tax Commission of City of New York*,
397 U.S. 664 (1970) 17, 18

OTHER AUTHORITIES:

Funeral Being Held For Capt. Edlavitch,
Evening Sun, Feb. 21, 1936, at 10,
available at http://tinyurl.com/y4a8bzqk 13

Tim Grady, *The German-Jewish Soldiers of the First World War in History and Memory* (2011) 10

Jewish Welfare Board, 59 Reform Advocate 556 (1920), *available at* http://tinyurl.com/yy8rsdwk 9

George L. Mosse, *Masses and Man* (1987) 10

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INTRODUCTION

For 93 years, the Peace Cross has stood in solemn commemoration of the 49 residents of Prince George's County who gave their lives "in the Great War for the liberty of the world." JA 932. Its symbol, the Latin cross, is one "often used to honor and respect" the Nation's fallen soldiers. *Salazar* v. *Buono*, 559 U.S. 700, 721 (2010) (plurality opinion). Its inscriptions, setting, and usage are exclusively secular. And for centuries, similar crosses have been displayed throughout the country to commemorate

sacrifice and military valor. Under this Court's well-settled precedents, the Establishment Clause does not demand that this longstanding monument be dismembered or destroyed.

Despite the length and tenor of their brief, respondents come up all but empty-handed in their effort to show otherwise. Respondents start by claiming that the Latin cross has an "exclusively Christian meaning." Resp. Br. 16. But they ultimately concede that "context matters" in determining what message the Latin cross conveys, *id.* at 96, and that many war memorials that bear the shape of a cross—including two similar World War I memorials in Arlington National Cemetery—may in fact communicate a secular message of commemoration. *Id.* at 93-98.

As to the Peace Cross itself, respondents do not contest that the Latin cross was a ubiquitous symbol of the World War I dead, that the content and setting of the memorial are secular, and that the Peace Cross has consistently been used as a site for civic commemorative events. Instead, respondents' case against the Peace Cross boils down to essentially two claims: that the memorial is "prominent," and that the origins of the Peace Cross were drenched in sectarianism and racism. The size of the cross, however, says nothing about the *content* of its message. And virtually every one of respondents' outrageous and largely irrelevant smears against the memorial's founders is demonstrably false.

Nor do respondents dispute that there is a centuries-old tradition of erecting cross monuments. They argue merely that this tradition may be ignored. But the Court held otherwise in *Town of Greece* v. *Gallo-*

way, 572 U.S. 565 (2014), and respondents offer no reason to revisit that recent and well-supported precedent.

In the end, respondents produce little but rhetoric to support the decision below. That is no surprise. This Court upheld a monument markedly analogous to the Peace Cross in *Van Orden* v. *Perry*, 545 U.S. 677 (2005). And requiring the removal or disfigurement of this nearly century-old memorial to the war dead, and hundreds more like it, would sow the very divisiveness the Establishment Clause is designed to prevent. The judgment should be reversed.

ARGUMENT

THE PEACE CROSS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

A. The Establishment Clause Does Not Categorically Prohibit Displaying A Cross As A Symbol Of Sacrifice And Loss.

This Court has long made clear that governments may display religious symbols without violating the constitutional commitment to religious neutrality. In some cases, the Court has held that *context* renders such displays constitutional, by demonstrating that the purpose and objective meaning of the display are predominantly secular. Comm'n Br. 26-31. In other instances, the Court has looked to *history*, finding that a long tradition of such displays shows that they can coexist with principles of disestablishment. *Id.* at 31-33. The Latin cross is no exception: As the plurality explained in *Buono*, "a Latin cross is not merely a reaffirmation of Christian beliefs," but "a symbol often used to honor and respect" the Nation's war dead. 559 U.S. at 721.

Respondents devote the first section of their brief to rejecting these precedents wholesale. They contend that by displaying a symbol associated with a particular religion, the government necessarily endorses "sectarian religious belief." Resp. Br. 30-33 (citation omitted). And they argue that the Latin cross is so "obvious[ly]" and "potent[ly]" sectarian that it inevitably endorses the "doctrine of atonement through Christ's crucifixion." *Id.* at 34-53 (citations omitted). Those arguments are both fundamentally misguided and irreconcilable with this Court's longstanding precedents—and even respondents ultimately abandon them.

To start, respondents err by equating the display of a religious symbol with the endorsement of a particular religion. As respondents acknowledge, religious symbols often have "dual meaning[s]," *see* Resp. Br. 53, 91, and governments can and do display them to invoke their secular rather than religious connotations. For instance, in *Lynch* and *Allegheny*, the Court upheld the display of a crèche and a menorah, respectively, because in context they served as ways of "depict[ing] the origins" of a "National Holiday," *Lynch* v. *Donnelly*, 465 U.S. 668, 680-681 (1984), or of celebrating the values of "pluralism and freedom to choose one's own beliefs," *Cty. of Allegheny* v. *ACLU*, 492 U.S. 573, 634 (1989) (O'Connor, J., concurring in part and concurring in judgment); *see also Town of Greece*, 572 U.S. at 582-583 (rejecting "the suggestion that legislative prayer must be nonsectarian" to serve the "legitimate function" of solemnizing legislative sessions).

Respondents read these cases to stand for the proposition that displays of "sectarian symbols" are

permissible only if they are "seasonal," "remote," or "privately sponsored." Resp. Br. 30-33. But no case has imposed such "fixed, *per se* rule[s]" on the use of religious symbols. *Lynch*, 465 U.S. at 678. To the contrary, the Court has repeatedly emphasized that precisely the opposite characteristics—longevity, the presence of nearby secular displays, and association with civic values—can be powerful indications that a monument's meaning is secular. *See Van Orden*, 545 U.S. at 701-703 (Breyer, J., concurring in judgment); *Buono*, 559 U.S. at 715-716 (plurality opinion); *see also Pleasant Grove City* v. *Summum*, 555 U.S. 460, 473-478 (2009).[1]

Respondents are also incorrect in suggesting that the Latin cross is so inherently sectarian that a display of that symbol necessarily endorses Christian belief. Resp. Br. 34. No one denies, of course, that the cross is a "preeminent symbol of Christianity." *Buono*, 559 U.S. at 725 (Alito, J., concurring in part and concurring in judgment). But like other reli-

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[1] Respondents distort Justice Scalia's statements to suggest that he endorsed a categorical prohibition on sectarian symbols. *See* Resp. Br. 31. In *McCreary County* v. *ACLU*, Justice Scalia *rejected* the suggestion that displaying a version of the Ten Commandments ascribed to by only some faiths amounts to "taking sides in a doctrinal controversy" or endorsing "a particular version of the Decalogue as authoritative." 545 U.S. 844, 894 n.4, 909 n.12 (2005) (Scalia, J., dissenting). And in *Capitol Square Review & Advisory Board* v. *Pinette*, Justice Scalia *distinguished* between "the government's use of religious symbols" and the "endorse[ment] [of] sectarian religious belief," explaining that *Lynch* upheld "a city's display of a crèche"—an indisputably Christian symbol—"because, in context, the display did not endorse religion." 515 U.S. 753, 764-765 (1995) (plurality opinion).

gious symbols, a cross is capable of conveying "different messages." *Id.* (citing *Summum*, 555 U.S. at 474); *see id.* at 747 n.7 (Stevens, J., dissenting) (in certain contexts, "th[e] cross * * * may be understood to convey a primarily nonreligious message"). *Buono* thus found that the display of an unadorned Latin cross to commemorate the World War I dead did not "promote a Christian message" or "set the *imprimatur* of the state on a particular creed," but served "simply to honor our Nation's fallen soldiers." *Id.* at 715 (plurality opinion).

Respondents dismiss that statement as "dicta." Resp. Br. 42-43. Not so. The plurality's understanding of the cross's meaning was integral to its holding that the district court "took insufficient account of * * * context" when it found that Congress had an "illicit" motive in acting to preserve the Sunrise Cross. *Buono*, 559 U.S. at 715.

Nor has the Court elsewhere characterized the cross as an exclusively religious symbol. *Cf.* Resp. Br. 32-35. In *Pinette*, the Court assumed that a cross erected by the Ku Klux Klan on government property was "private religious speech"; it did not decide whether that display actually conveyed a primarily religious message, let alone whether other, entirely dissimilar cross monuments would do so. 515 U.S. at 760; *see id.* at 771 (Thomas, J., concurring) (concluding that the Klan cross was "primarily nonreligious"). In *Allegheny*, Justice Blackmun and Justice Kennedy agreed that the government may not display crosses that carry an obvious endorsement of Christianity, such as a cross erected by "the Holy Name Society * * * on the Grand Staircase at Easter," 492 U.S. at 599 (opinion of Blackmun, J.), or "a

large Latin cross on the roof of city hall," *id.* at 661 (Kennedy, J., concurring in judgment in part and dissenting in part). The Court said nothing about crosses more generally; and in *Buono*, Justice Kennedy expressly distinguished those extreme examples from the World War I cross at issue, explaining that unlike the hypothetical "'cross on the roof of city hall,'" the memorial in *Buono* "was not emplaced on Sunrise Rock to promote a Christian message." 559 U.S. at 715 (plurality opinion) (quoting *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part)).[2]

Respondents also argue that any display of a cross to convey a secular message impermissibly "degrade[s] religion." Resp. Br. 49. That argument, however, would invalidate *every* government display of a religious symbol for a secular end, directly contrary to the Court's precedents. And it rests on a false premise: The government's use of a religious symbol for a secular purpose does not dictate how private individuals view the symbol, or prevent adherents from continuing to find religious meaning in it. *See Lynch*, 465 U.S. at 685 (observing that "[t]he crèche may well have special meaning to those whose faith includes the celebration of religious

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[2] Respondents assert that their amici who are "non-Christians" are "the arbiters" of what crosses mean. Resp. Br. 37. That is not correct. The Establishment Clause requires an objective inquiry into the purpose and meaning of a challenged display, not a straw poll of objectors. And members of minority religions have come down on both sides of this question. *See, e.g.*, Nat'l Jewish Comm'n on Law & Public Affairs Br.; Jewish Coalition for Religious Liberty Br.; Kamal S. Kalsi Br; Islam & Religious Freedom Action Team Br.

masses"); *Summum*, 555 U.S. at 475 (explaining that "monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers").

In the end, even respondents admit that the cross does not always and inevitably convey a message of sectarian favoritism. When faced with the untenable implications of that position—*i.e.*, that every government display employing a cross would need to be torn down—respondents abruptly backtrack. "[C]ontext matters," they admit, Resp. Br. 96, and thus numerous displays that employ the cross as a symbol of sacrifice may in fact be constitutional, *id.* at 93-98. That is a welcome concession, but it forfeits the central premise of respondents' brief: that the Latin cross is a "symbol of Christianity and Christianity alone." *Id.* at i.

Despite respondents' rhetoric, then, respondents and the Commission ultimately agree on the basic inquiry in this case. The cross sometimes conveys a message of secular commemoration and sometimes does not. And the Court should consult context and history to determine its meaning in a particular case.

B. The Peace Cross Is Constitutional.

1. *The purpose and objective meaning of the Peace Cross are secular.*

That well-settled inquiry resolves this case. Respondents do not dispute that, in determining the purpose and meaning of the Peace Cross, the Court should apply the considerations set forth in the controlling opinions in *Van Orden* and *Buono*. *See* Resp. Br. 53-54; *accord* U.S. Br. 25-30. Every one of those considerations powerfully affirms the Peace Cross's constitutionality.

a. As *Buono* held, the symbol used by the Peace Cross can convey not only a Christian message, but a secular message of "honor[ing] our Nation's fallen soldiers." 559 U.S. at 715, 721 (plurality opinion); *see* Comm'n Br. 4-9. Multiple amici confirm as much: As they extensively show, in the wake of World War I the Latin cross became a ubiquitous symbol of sacrifice and loss—in poetry and visual art, in military honors, in contemporaneous statements of the bereaved, and in numerous memorials to the fallen. *See, e.g.*, VFW Br. 10-26; Retired Generals & Flag Officers Br. 8-13; U.S. Senators & Representatives Br. 4-9.

Respondents and their amici make no attempt to engage with this mountain of historical evidence. Instead, they reason that because the cross was used as a grave marker for individual Christians, it follows that the cross honors only Christians when used as a universal symbol of sacrifice. Resp. Br. 42-47. That does not follow. As respondents' own expert has written, the cross assumed a meaning as "a cultural image of the battlefield" that transcended its use as an individual grave marker. JA 1127; *see* JA 937, 1143. By evoking the seas of crosses on the front, the builders of the Peace Cross and other such memorials recalled not only the individual men buried under battlefield crosses—many of whom were themselves not Christian[3]—but also what the

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[3] Crosses were used to mark the graves not only of Christians, but of individuals whose faith was unknown or who were neither Christian nor Jewish. JA 108-109, 945. Furthermore, at the time the Peace Cross was designed, many Jewish soldiers who had not yet been identified were buried under crosses. *See Jewish Welfare Board*, 59 Reform Advocate 556, 556 (1920),

"crosses row on row" came to represent: the unfathomable toll of the war, the cause for which the soldiers fought, and the far-off cemeteries where countless dead had been laid to rest. Comm'n Br. 4-7; *see* VFW Br. 9-17.

b. The face of the Peace Cross and the circumstances surrounding its placement confirm that the monument was erected to convey a secular message of sacrifice and loss. The Cross's dedication, inscriptions, and insignia are exclusively secular; the Cross was erected by bereaved mothers and a veterans organization for the stated purpose of honoring the war dead; and the government acquired the monument for preservation and traffic safety purposes, while permitting the American Legion to continue to

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available at http://tinyurl.com/yy8rsdwk; JA 1199-1202. And it is well-documented that some Jewish families from combatant nations assented to the use of a cross to bury their loved ones because they did not view it as a religious symbol. *See* Tim Grady, *The German-Jewish Soldiers of the First World War in History and Memory* 37-38 (2011) (explaining that "[m]any German Jews * * * consented to the use of Christian symbols in the burial of Jewish soldiers at the front" because "[i]nstead of symbolising Christianity, German Jews regarded these objects or markers as a sign of the German war experience"); *see also* George L. Mosse, *Masses and Man* 267 (1987) (stating that an American Jewish leader "protested" when "the Star of David was substituted" for "crosses on the graves of Jewish soldiers" because "Jews and Christians fought shoulder to shoulder, actuated by the same patriotic impulse"); Retired Generals & Flag Officers Br. 9 (concluding that some American Jewish families requested that their relatives be buried under a cross).

conduct civic commemorative events at the site. Comm'n Br 37-39.[4]

Respondents shut their eyes to virtually all of this evidence, going so far as to assert that the Peace Cross has "*no* secular features" apart from the Legion symbol. Resp. Br. 9. Respondents instead focus on such aesthetic minutiae as the fact that the cross is "light brown" rather than "white" and that sometimes the bushes surrounding it are overgrown. *Id.* at 9-10, 47. The Establishment Clause inquiry does not turn on such trivial details; and in any event, when the Peace Cross was designed and built, the cross markers overseas were made of wood, not white marble, and memorial crosses often varied in color. *See* JA 941-953, 1163-64.

Respondents also level a staggering, scorched-earth campaign against the monument's founders, impugning their motives and tarring them as anti-Semites and racists. Resp. Br. 1-8, 47-49. Space constrains our ability to respond at length to all of these distortions, which have only passing relevance to the constitutional inquiry. *See Van Orden*, 545 U.S. 701-702 (Breyer, J., concurring in judgment) (upholding monument where private founders had "primarily

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[4] Respondents accuse the Commission of "mislead[ing]" the Court by claiming that "the Commission owns the 'Cross only because of roadway expansion and traffic safety concerns.'" Resp. Br. 11 (purportedly quoting Comm'n Br. 13). The quoted language does not appear in the Commission's brief, which acknowledges on the very page respondents cite that the Commission acquired the Peace Cross in part "to preserve the monument." Comm'n Br. 13.

secular" motives). But virtually every scandalous claim in respondents' brief is untrue.

The monument's founders did not refer to the monument as the "Calvary Cross," use it as a site for prayer services, or borrow its design from a Catholic shrine. *See* Resp. Br. 1-4, 48-49. The four references to "calvary" that respondents identify were made, in passing, by newspaper reporters and an invited speaker, JA 216, 428, 431, 433; in every recorded instance in which the monument's founders referred to the Cross, they called it the "Memorial Cross" and referred to its organizing committee as the "Prince George's County Memorial Committee." *See, e.g.*, JA 172-175, 210-211, 1001, 1014, 1056-58, 1060-61, 1244. All of the "prayers" to which respondents refer were simply benedictions or invocations at veterans' events or dedication ceremonies. JA 217-218, 472, 474, 477, 1058-59, 1407-08. One event they discuss did not occur at the Peace Cross at all. JA 1061 (describing event at Zantzinger's Park in the neighboring town of Hyattsville). John Earley was a noted sculptor whose work ran the gamut from a Bahá'í temple to a replica of the Parthenon. *See* JA 1348-50. That one of his many prior works was a Catholic shrine does not transform his "mosaic and thin-panel methods" into acts of religious endorsement. Resp. Br. 48 (quoting JA 1350).

Nor is there merit to respondents' outrageous charges of racism and anti-Semitism. Ten of the men honored on the Peace Cross are African-Americans, JA 1559-69, and one of the local American Legion leaders principally responsible for its construction was J. Moses Edlavitch, a Jewish veteran who immigrated to the United States from Russia

when he was 14. *See* JA 65, 205, 990; *Funeral Being Held For Capt. Edlavitch*, Evening Sun, Feb. 21, 1936, at 10, *available at* http://tinyurl.com/y4a8bzqk. As the District Court found, the suggestion that there is some connection between the Peace Cross and the Ku Klux Klan is "simply wrong." Pet. App. 62a n.5. None of the Klan events respondents describe took place at the Cross, and most occurred miles away. *See* JA 118-119, 495-496, 505-506. There is also no evidence that the "carnival games" that respondents reference were used to support the memorial. Resp. Br. 7, 80; *see* C.A. JA 2075.[5]

Then there is respondents' breathtaking charge that a Gold Star mother, Mrs. Martin Redman, was making a "mercenary plea," Resp. Br. 48, when she thanked her senator for supporting the Peace Cross by explaining that "my son * * * lost his life in France and because of that I feel that our memorial cross is, in a way, his grave stone," JA 989. Redman's son, respondents sneer, "is not even named on the Cross." Resp. Br. 48. In fact, Redman was "the first Navy man lost to Prince George's County," and his bereaved mother was given the honor of dedicating the highway next to which the Cross stood. JA 175-176.

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[5] Amicus Military Religious Freedom Foundation speculates (at Br. 19-22) that the Peace Cross selectively excludes Jewish veterans. That charge is baseless. There is no record of the religion of many of the men named on the memorial, let alone evidence that a single Jewish veteran was excluded. Moreover, a nearby display that respondents concede is secular similarly lists 47 "Men from Prince George's County" who died in the war. JA 111-112; *see* Resp. Br. 1 (stating that "the same names" are listed on the two memorials).

c. The physical setting of the Peace Cross confirms its commemorative meaning. It is part of a collection of commemorative monuments known as Veterans Memorial Park, and holds a "strategic position" on the National Defense Highway dedicated to the servicemembers who died in the war. JA 1246; *see* Comm'n Br. 39-40. Respondents argue that the Peace Cross is not "integrated with other monuments." Resp. Br. 61. To the contrary, the Peace Cross and the surrounding memorials bear a consistent theme, and a nearby National Park Service trail marker entitled "Honoring their Service" describes each of the memorials and states that the area "has become a place for communities to commemorate their residents in service and in death." JA 1517-18. In addition, all of the surrounding monuments are located within approximately 300 feet of the Peace Cross, such that a person standing or driving nearby can easily see multiple monuments at once. JA 1528-29; *see* JA 887-904 (map and photographs of park).

Respondents repeatedly observe that the Peace Cross is "prominent"—indeed, they make this the centerpiece of their argument, repeating the point on the first page of their brief, the 97th, and numerous places in between. *See* Resp. Br. i, 1, 20, 21, 23, 25, 33, 37, 47, 54, 57, 58, 61, 63, 73, 87, 92, 97. But as respondents acknowledge, the monument's prominence just means that it "speaks more loudly," *id.* at 57; it does not alter what it says. If anything, the frequency with which individuals encounter the monument helps establish "a shared understanding of its legitimate nonreligious purpose." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring in judgment); *see Van*

Orden, 545 U.S. at 700 (Breyer, J., concurring in judgment) (upholding "large granite monument * * * on the grounds of the Texas State Capitol"). As local officials explain, that is exactly what happened here: the Peace Cross has become "a prominent shared civic space central to the communal life of Bladensburg and Prince George's County." Maryland Elected Officials & Prince George's County Br. 8-13.

d. Finally, respondents do not dispute that, for 93 years, the Peace Cross has served virtually exclusively as a site for secular commemorative events, that it has become a historic landmark, and that until this litigation there was no record of any person challenging it as a religious symbol. Comm'n Br. 41-44; *see* Maryland Elected Officials & Prince George's County Br. 5-18; Maryland Br. 3. Respondents' only response to this century of history is to repeat their claim that the Peace Cross has been the site of "prayers," Resp. Br. 12-13, 64; again, those were benedictions and invocations at commemorative events. *See, e.g.*, JA 187-188, 249, 1043. Respondents also darkly note that the Commission thanked an Air Force chaplain for delivering a benediction at the Veteran's Day service in 1985. Resp. Br. 12 (citing JA 195). Basic courtesy does not violate the Establishment Clause.

Respondents speculate that the Peace Cross went unchallenged for nearly 90 years because, throughout that period, the State of Maryland was gripped by a "climate of intimidation" toward religious minorities. Resp. Br. 65-66 (citation omitted).[6] That

[6] Respondents state that their counsel received threats in connection with a separate suit challenging a religious display

defies credulity. It has been half a century since plaintiffs challenged and succeeded in overturning the very Maryland laws that respondents claim contributed to an air of stifling censorship. *See Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961); *State* v. *West*, 263 A.2d 602, 603-604 (Md. Ct. Spec. App. 1970). The likely reason that no one challenged this monument until a few years ago is that "few individuals, whatever their system of beliefs, * * * understood the monument as amounting * * * to a government effort to favor a particular religious sect." *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment).

2. *The Peace Cross fits within an undisputed tradition of displaying crosses as symbols of sacrifice and military valor.*

The Peace Cross is also constitutional for the independent reason that it fits within a centuries-old tradition of displaying the cross as a symbol of martial valor and sacrifice. Comm'n Br. 44-50. Cross monuments have been erected in the United States since the earliest settlers arrived in America, and hundreds of crosses now stand in honor of those who fought and died in the Civil War, the World Wars, and other local and national tragedies. *Id.* at 45-48. Amici have identified many additional examples of that tradition: a stone cross honoring a messenger who fell during the Battle of Chickamauga; World War I crosses in Baltimore, Brooklyn, and Philadelphia; and monuments from Coos Bay, Oregon, to

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in Pensacola, Florida. Resp. Br. 66. The Commission unequivocally denounces such threats, which have no place in this or any other litigation.

Lewisville, North Carolina, honoring the fallen of every war since the Revolution. *See, e.g.*, West Virginia & 29 Other States Br. 18-26; U.S. Senators & Representatives Br. 4-15; Various Professors Br. 15-19; Utah Highway Patrol Ass'n Br. 6-20.

Respondents and their amici scarcely attempt to dispute the existence or breadth of this tradition. Respondents quibble (at 74-75) that two of the examples are English crosses or Maltese crosses, rather than Latin or Celtic crosses. That objection makes little sense; these crosses all ultimately derive from the same religious symbol. And, in any event, those two examples are drops in the ocean of examples the Commission and its amici have identified.

Respondents instead rest on the claim that this longstanding history is simply irrelevant. Resp. Br. 67-71. But *Town of Greece* expressly held that "the Establishment Clause *must* be interpreted 'by reference to historical practices and understandings,'" and that "it is not necessary to define the precise boundary of the Establishment Clause *where history shows that the specific practice is permitted*." 572 U.S. at 576-577 (emphases added) (citation omitted). Nothing in the language or logic of the opinion was limited to legislative prayer and other "internal practice[s]." Resp. Br. 70-73. And prior cases have relied on history and tradition to uphold a variety of other practices and displays. *See* Comm'n Br. 31-33.

Respondents' cases only confirm as much. In *Walz* v. *Tax Commission of City of New York*, 397 U.S. 664 (1970), the Court explained that while "no one acquires a vested or protected right in violation of the Constitution," an "unbroken practice" engaged in since 1802 without "the remotest sign of leading to

an established church or religion" was "significant" in showing that the practice was "not a violation of the Religion Clauses." *Id.* at 677-680; *accord Town of Greece*, 572 U.S. at 576 (explaining that history does not excuse a violation but rather shows that a practice is permitted). In *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), the Court distinguished *Walz* and struck down a different program in part because it could identify "no historical precedent" for it. *Id.* at 792. In the remaining cases respondents cite, *see* Resp. Br. 69-70, the Court did not find—let alone discount—any post-Founding precedent for the challenged practices.

Respondents also argue that the tradition of erecting memorial crosses is too recent because it does not date to the Founding. *Id.* at 73. In fact, memorial crosses have been erected since prior to the Founding, including one just a few years before the Constitution was ratified. Comm'n Br. 45-46 (describing Acadian Cross constructed in 1785); *see also* West Virginia & 29 Other States Br. 11-15 (describing other memorials from founding era using religious symbolism); U.S. Senators & Representatives Br. 15-17 (same). Furthermore, longevity is probative in large part because it demonstrates that a practice has become "part of our expressive idiom" and can "coexis[t] with *** principles of disestablishment." *Town of Greece*, 572 U.S. at 578, 587 (citation omitted). Thus, several practices paradigmatically "part of our heritage and tradition," *id.* at 587, postdate the Founding: The practice of opening court sessions with the phrase "God save the United States and this honorable Court" dates to approximately 1827; the phrase "In God We Trust" first appeared on the

Nation's currency during the Civil War and became the national motto in 1956; and the words "under God" were added to the Pledge of Allegiance in 1954. *Newdow*, 542 U.S. at 25, 29 (Rehnquist, J., concurring in judgment). The tradition of the commemorative use of the cross has been "part of the fabric of our society" for at least as long. *Town of Greece*, 572 U.S. at 576 (citation omitted).

Trying the opposite tack, respondents argue that the practice of displaying crosses is *too old* because "the values [of] our nation ha[ve] developed" since the time when crosses were prevalent. Resp. Br. 80. On the contrary, Congress—a body "in which our country's religious diversity is well represented"—has repeatedly voted by "overwhelming majorities" in recent years to preserve longstanding cross memorials. *Buono*, 559 U.S. at 727 (Alito, J., concurring in part and concurring in judgment); *see* Comm'n Br. 48–49. An outpouring of amici, including religious minority groups, members of Congress, and more than two dozen diverse States, have filed in support of retaining the Peace Cross and other similar memorials. And individuals "of diverse cultural backgrounds and religious traditions" still gather at the Peace Cross every year "to commemorate American servicemembers." Maryland Elected Officials & Prince George's County Br. 9. The mere fact that several court cases—the earliest dating to the late 1970's—have been filed against cross monuments, *see* Resp. Br. 78, does not suggest that history has abandoned this practice. *Cf. Marsh* v. *Chambers*,

463 U.S. 783, 788 n.10 (1983) (describing prominent objections to legislative prayer dating to the 1850's).[7]

3. Invalidating the Peace Cross would sow division and threaten hundreds of other monuments.

The purposes of the Establishment Clause confirm that the Peace Cross should be permitted to stand. Invalidating this 93-year-old war memorial would tear out a local source of civic unity, Maryland Elected Officials & Prince George's County Br. 8-15, send a message of profound disrespect and betrayal to the descendants of the fallen, Family Members Br. 1-6, 20-21, and convey to veterans and servicemembers that their sacrifices too may one day be forgotten, Military Order of Purple Heart Br. 17-18. It would imperil hundreds of other monuments throughout the country—including two comparable memorials at Arlington National Cemetery—solely because they use a cross. *See* U.S. Senators & Representatives Br. 3-21. The Establishment Clause seeks to prevent religious division; tearing down or dismembering the Peace Cross would sow it. *See Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in judgment).

Respondents' proposed "solution[s]" would merely exacerbate these harms. Resp. Br. 99-100. Their principal suggestion is that the cross be "modified"

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[7] Respondents' claim (at 75) that Jewish groups have opposed cross monuments since the 1920's is not accurate. The Jewish Welfare Board opposed *requiring* the erection of crosses over the graves of individual Jewish servicemembers. JA 1202-03. There is no record that the Jewish Welfare Board or any other group opposed the erection of memorial crosses at Bladensburg, Arlington, or elsewhere.

into a "slab or obelisk" by chopping off its arms, *id.* at 18—an act of such wanton disrespect that one amicus compares it to Swift's "Modest Proposal." Military Order of Purple Heart Br. 2. Alternatively, respondents suggest that the Peace Cross be physically "removed to private property." Resp. Br. 17-18. But as the Commission has explained, the "only way" this aging monument could be moved would be to "dismantle or destroy" it and then attempt to "reconstruct it" at a different location. JA 1073-74. That would not only damage the monument irreparably, but also decouple it from its historically significant location and impair the Commission's ability to ensure its preservation in the future. C.A. JA 621-623.[8]

Furthermore, respondents offer no plausible way to prevent similar acts of destruction from occurring across the country if the Peace Cross is invalidated. Respondents assert that there are virtually no other monuments in the shape of freestanding crosses. Resp. Br. 93-95. That is plainly not correct. *See supra* pp. 16-17. Respondents' estimate of "three" World War I cross memorials is telling: That count omits the Argonne Cross, the Canadian Cross of Sacrifice, the memorial cross at St. Mihiel American Cemetery, the Wayside Cross, the Rustic Cross, the Chestnut Hill and Mt. Airy Memorial, and many

[8] Respondents' suggestion that the Commission is indifferent to whether the monument falls, *see* Resp. Br. 14-15, is absurd. The documents respondents cite were part of a determined effort to *ensure the monument's preservation*, and respondents elsewhere fault the Commission for spending too much money to preserve the monument. *Id.* at 56.

others. *See, e.g.*, Comm'n Br. 7-8 & n.7; West Virginia & 29 Other States Br. 20-23.

Respondents suggest that other cross memorials could potentially be distinguished from the Peace Cross on the ground that they serve as "ethnic marker[s]" or are "integrated component[s] of a larger display." Resp. Br. 93-96 (internal quotation marks omitted). These proposed distinctions are, of course, utterly incompatible with respondents' theory that the Latin cross necessarily conveys a religious message. *See id.* at 30-47. They also make little sense. There is no reason why a cross's "ethnic" associations would render it secular if the established meaning of the cross as a World War I symbol cannot. And the Peace Cross is itself integrated into a larger display. *See supra* p. 14.

Respondents' attempts to distinguish the Argonne Cross and the Canadian Cross of Sacrifice are especially unconvincing. *Id.* at 96-98. Those memorials bear every characteristic respondents claim is fatal to the Peace Cross: They use the Latin cross as a universal symbol of sacrifice, they are substantially larger than the surrounding displays, and they are permanent, government-owned, and longstanding. Comm'n Br. 7; *cf.* Resp. Br. 30-66. Respondents claim these memorials could be distinguished because they are surrounded by individual grave markers bearing religious symbols, and because the area in which they stand is "as sacred as a temple or a church." Resp. Br. 96-97 (citation omitted). But the proximity of sectarian symbols and the "sacred[ness]" of the space would if anything *detract* from the secular nature of these large crosses. *See Van Orden*, 545 U.S. at 702 (finding monument

secular in part because "[t]he physical setting * * * suggests little or nothing of the sacred"). If the Peace Cross falls, then monuments in Arlington and in city squares across the country will not be far behind.

C. The Court Should Not Revisit Its Longstanding Precedents Or Apply *Lemon* Here.

Because the undisputed principles of the Court's Establishment Clause precedents resolve this case, the Court should not revisit those precedents here. *See Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). Uprooting the Court's long-settled understanding of the Establishment Clause would inevitably generate deep religious divisions. And it would risk transforming the Peace Cross—long a source of civic unity—into a controversial and divisive symbol. Reversing the decision below under existing law would suffice to resolve this litigation, and would provide substantial clarity for lower courts and local governments on a range of recurring issues. *See* Comm'n Pet. 21-32; Br. of Nat'l Ass'n of Counties *et al.* 25-27.

Nor should the Court decide this case under *Lemon*. The controlling opinions in *Van Orden* and *Buono* did not apply the *Lemon* test, and respondents make essentially no independent argument that *Lemon* supports the judgment below. *See* Resp. Br. 91 n.17, 92-93. Respondents briefly suggest that the Commission's expenditure of $117,000 over the course of 50 years itself amounts to unconstitutional entanglement. *Id.* at 56, 92-93. But these funds paid for groundskeeping and maintenance, and entailed no involvement in or surveillance of religion.

See Comm'n Br. 58. The Establishment Clause plainly does not prevent governments from taking steps to preserve a commemorative monument, and to avoid the disturbing message that would be sent by its removal. *See Buono*, 559 U.S. at 715-717 (plurality opinion); Maryland Br. 2-4.

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

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No. 18-18

In The Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR STATE OF MARYLAND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. THE COURT SHOULD CLARIFY THAT STATES ARE NOT REQUIRED TO PURGE THEIR HISTORY AS MONUMENTS AGE AND REQUIRE MAINTENANCE	2
II. AN ESTABLISHMENT CLAUSE INQUIRY MUST TAKE ACCOUNT OF UNIQUE PRIVATE INTERESTS IN MONUMENTS WITH A RELIGIOUS ELEMENT	4
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

American Atheists, Inc. v. City of Detroit Downtown Dev. Auth., 567 F.3d 278 (6th Cir. 2009) 4

Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 6

Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) 6

Lynch v. Donnelly, 465 U.S. 668 (1984) 6

Salazar v. Buono, 559 U.S. 700 (2010) 4

Taylor v. Town of Cabot, 178 A.3d 313 (Vt. 2017) 4

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I ..... *passim*

STATUTES

Md. Code Ann., Land Use Title 15, subtitle 1 (LexisNexis 2017) 1

RULES

Sup. Ct. R. 37.4 1

INTEREST OF AMICUS CURIAE[1]

Petitioner Maryland-National Capital Park and Planning Commission (the "Commission"), an agency created under Maryland law that administers a regional system of parks in two of Maryland's counties,[2] owns and maintains the World War I memorial at issue in this case. Maryland has a longstanding interest in respecting and preserving the reserved property rights of the American Legion in the monument while ensuring that the Peace Cross, an historic memorial that honors members of the military from Prince George's County, Maryland, is properly maintained in a manner that ensures public safety.

SUMMARY OF ARGUMENT

I. This case illustrates—and provides the Court an opportunity to resolve—the dilemma states face when aging historic monuments that contain an arguably religious element require state support to mitigate a threat to public safety. No one disputes that the Peace Cross has been badly damaged by the passage of time, and that the Commission's only interest in the property is ensuring the monument's maintenance. When private monuments become a danger to public safety, states need flexibility to act without fear of

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[1] The State of Maryland submits this brief under Supreme Court Rule 37.4.

[2] *See* Md. Code Ann., Land Use Title 15, subtitle 1 (LexisNexis 2017).

being held to have violated the Constitution. The Court should confirm that states' options in such circumstances are not limited to destroying aging monuments, thereby communicating disrespect to the message conveyed by private memorials.

II. The Court should also confirm that in Establishment Clause cases, the practical realities of how a property is used must be given weight. The Peace Cross began as a private monument, and even after the Commission took title to it, its private owners have enjoyed rights similar to those of actual ownership, whereas the Commission has no involvement with the property other than ensuring its upkeep. This Court's Establishment Clause cases recognize the importance of context and public perception in evaluating whether a governmental action constitutes an endorsement of religion, and the Court should clarify that when private parties retain substantial involvement in the use of a monument, the Establishment Clause does not prohibit states from overseeing the monument's upkeep.

ARGUMENT

I. The Court Should Clarify That States Are Not Required to Purge Their History as Monuments Age and Require Maintenance.

States require flexibility to balance competing interests when historic preservation and public safety collide. This is not a case in which a state built a

religious monument on public land; rather, it is a case in which a state assumed care of an aging monument only after it had become an established icon in the local community. This Court's Establishment Clause jurisprudence must allow states to provide secular support to structures like the Peace Cross, or else those memorials and the message they convey may become lost to time.

No one disputes that the Commission's sole motivation for acquiring title to the Peace Cross site was to keep it in good repair. The Peace Cross was built by private parties on private land, and by the time the Commission acquired the site, the monument had begun to badly decay, creating a risk to public safety. The 40-foot-tall monument towers over "a traffic island taking up one-third of an acre at the busy intersection of Maryland Route 450 and U.S. Route 1," Pet. App. 8a, and it has begun to fall apart. It has developed deep cracks, its reinforcements are corroding, and it is swelling outward. J.A. 739-49. At the same time, the Cross, and its message of tribute to locals who gave their lives for their country, have become a cherished part of the community's historical fabric. Thus, the Peace Cross presented a true conundrum: Should Maryland ignore a public safety hazard, risk violating the Establishment Clause by assuming responsibility for the monument's maintenance, or extinguish the Cross's message by demolishing it?

This case presents an opportunity for the Court to resolve the "dilemma" it identified when governments cannot "maintain [a] cross" without violating the

Constitution, but cannot "remove the cross without conveying disrespect for those the cross was seen as honoring." *Salazar v. Buono*, 559 U.S. 700, 716 (2010). Although *Salazar* gestured toward the difficult choice historic monuments with religious elements can pose for states, the Court left open the question of what options states have to deal with that choice. The Court should resolve the question that *Salazar* left unanswered, or else states will continue to find their efforts at historic preservation subject to constitutional challenge. *See American Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 290 (6th Cir. 2009) (holding that Detroit did not violate the Establishment Clause by including churches in a revitalization program that allowed private properties to receive municipal reimbursements for exterior refurbishments); *Taylor v. Town of Cabot*, 178 A.3d 313, 323 (Vt. 2017) (relying on *American Atheists* to uphold town's decision to award grants to historic churches for repairs).

Now that the question is squarely presented, the Court should hold that the Establishment Clause allows states to ensure the safety of historic monuments that are valued by local communities, even if those monuments contain an allegedly religious element.

II. An Establishment Clause Inquiry Must Take Account of Unique Private Interests in Monuments with a Religious Element.

The Court should also clarify that when a private entity acts as the de facto, if not de jure owner of a

monument, the entity's use of the property must be considered as part of any Establishment Clause inquiry. Although today legal title to the Peace Cross site is held by a state governmental entity, the cross's original private owners continue to enjoy substantial interests in it that should be given legal weight.

It was understood that the Commission was acquiring the property solely to "assume the obligation of maintaining, repairing and otherwise caring for said Cross and the land upon which it is erected." J.A. 1386. After title passed to the Commission, the American Legion continued to use the monument as if it were the owner, and today uses the site to hold memorial services and ceremonies. Pet. App. 60a. The transfer of ownership to the Commission came with the understanding that the American Legion retains the right to use the site and would be notified if the Cross were to be removed from the Commission's jurisdiction, so that it could "make arrangements for the care and maintenance of the Cross and the surrounding parcel." Pet. App. 60a; J.A. 1386. By comparison, despite being the legal owner of the property, the Commission has not used it for any purpose; indeed, "[t]here is no evidence that the Commission consults with any churches or religious organizations to determine who may access the Memorial for events" or "that the Commission is required to be involved in any church-related activities to maintain the Memorial." Pet. App. 51a (Gregory, C.J., concurring in part and dissenting in part).

The Court should clarify that this context matters, and that when a monument looks like private property

and is used like private property, the Constitution does not prohibit a state from becoming the property's custodian solely to ensure the monument remains safe. Nor should the formalities of legal title override public perception of whether a monument constitutes government endorsement of religion. It is an essential tenet of the Court's Establishment Clause jurisprudence that "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring); *see also, e.g.*, *id.* at 679 (majority opinion) ("[T]he focus of our [Establishment Clause] inquiry must be on the [display] in . . . context[.]"); *id.* at 690 (O'Connor, J. concurring) (analogizing government religious displays to statements and noting the importance of judging intent by "examining the context of the statement"); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (noting that a reasonable observer in Establishment Clause cases must be "deemed aware of the history and context of the community and forum" in which the speech takes place (quoting *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring in part and concurring in judgment))).

In context, the Peace Cross very much remains the American Legion's monument, and the Commission's involvement in supporting its maintenance does not violate the First Amendment. The Court should confirm that a private entity's substantial interests in a

property are a relevant factor that weighs against finding an Establishment Clause violation.

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

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